VOLUME 7 1973 NUMBER 2

INDIANA LAW REVIEW

ARTICLES

ENFORCEMENT OF INJUNCTIVE ORDERS AND DECREES IN PATENT CASES *James C. Nemmers* 287

THE AMERICAN CONTRACT SYSTEM: TODAY AND 2001 *Justin Sweet* 309

COMMENT

SENTENCING PROVISIONS IN PROPOSALS FOR A NEW FEDERAL CRIMINAL CODE *Nile Stanton* 348

NOTES

THE MANAGEABILITY CRISIS OF CONSUMER CLASS ACTIONS: THE SEVERE EXAMPLE OF EISEN III 361

PRODUCTS LIABILITY IN INDIANA: CAN THE BYSTANDER RECOVER? 403

RECENT DEVELOPMENTS

ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT —Private letter rulings issued by the Internal Revenue Service held disclosable as interpretations of the law adopted by the agency.—*Tax Analysts & Advocates v. Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C. 1973), *appeal docketed*, No. 1978, D.C. Cir., Sept. 11, 1973. 416

CONSTITUTIONAL LAW—FAIR HOUSING ACT OF 1968— Antiblockbusting provision held to be a valid congressional exercise of thirteenth amendment enforcement power.— *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574). 432

The INDIANA LAW REVIEW is the property of Indiana University and is published six times yearly, November, December, January, March, April, and May, by the Indiana University Indianapolis Law School which assumes complete editorial responsibility therefor.

Subscription Rates: one year $7.50; three years, $18.00; five years $29.00; Canadian, $7.50; foreign, $8.00. Single copies, $2.00.

Send all correspondence to Business Manager, *Indiana Law Review*, Indiana University Indianapolis Law School, 735 West York Street, Indianapolis, Indiana 46202.

Publication Office: 735 West New York Street, Indianapolis, Indiana 46202.

Second-class postage paid at Indianapolis, Indiana 46201.

Volume 7 December 1973 Number 2

VOLUME 7 1973 NUMBER 2

INDIANA LAW REVIEW

ENFORCEMENT OF INJUNCTIVE ORDERS AND DECREES IN PATENT CASES

JAMES C. NEMMERS*

I. INTRODUCTION

Except for litigation terminating in the denial or award of monetary damages for an alleged injury to person or property, most litigation provides the successful litigant with some form of equitable relief in which the court either enjoins the other party from certain acts or directs that certain acts be performed for the benefit of the successful litigant. The patent owner who successfully conducts an action for infringement of his patent may be rewarded with a judgment and decree giving him both monetary damages for past infringement and injunctive relief against future acts constituting infringement of his patent rights.[1] If the judgment debtor is solvent, collection of a judgment for money damages involves postjudgment procedures familiar to most lawyers. However, for the lawyer involved in successfully obtaining relief for his client in a form other than a monetary award, the procedures for implementing an order or decree in the event the unsuccessful litigant fails or refuses to comply are broadly grouped in the category of "contempt proceedings."[2] Unless the practicing attorney has represented a client in a contempt proceeding, it may seem to him that these proceedings are always court initiated and solely for the benefit of vindicating the authority of the court whose order or decree has been ignored. However, the contempt powers of a court are much more extensive and can be an important and extremely effective means for the private litigant to enforce his rights as expressed in a court order or de-

---

*Member of the Iowa Bar; B.S., Iowa State University, 1953; J.D., University of Iowa, 1957.

[1]35 U.S.C. § 283 (1970) provides that the courts ". . . may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent . . . ." Section 284 proivdes that "[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement . . . ."

[2]A not too recent but excellent and comprehensive article containing many authorities, both state and federal, is Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943). A more recent work critical of the present state of the law is R. GOLDFARB, THE CONTEMPT POWER (1963).

cree. Such proceedings should, therefore, not be overlooked by the lawyer representing the holder of an injunctive decree. Moreover, the lawyer whose client is the party against whom the injunctive decree is directed should be fully aware of and advise his client as to the nature of such a decree and the serious consequences to which his client may be subjected if he decides to ignore the obligations imposed by the decree. Unless properly warned, a litigant may be surprised to find himself confronted with a *criminal* charge for doing or failing to do something that he thought involved only a private dispute.[3]

In this day of civil disobedience and disrespect for the judicial process,[4] the contempt power of the courts may be an important weapon to restore respect for the judiciary. All courts, both state and federal, have at their disposal the contempt power.[5] Because the federal courts have exclusive jurisdiction in patent

---

[3]The litigant's lawyer may be equally surprised. However, as this Article points out, a criminal sanction is clearly available in strictly civil matters, but the practice has been criticized. As noted by R. GOLDFARB, *supra* note 2, at 52:

> Whether the law of contempt is good or bad, the argument is even stronger against contempt proceedings in essentially civil matters, which are rarely treated with criminal sanctions or followed by criminal stigmas.

[4]The highly publicized trial of the "Chicago Seven" is an example of conduct within a court room that does little to increase respect for our judicial system. Two companion cases involving contempt charges grew out of the trial, and to date, the matters have not been finally resolved. *See* United States v. Seale, 461 F.2d 345 (7th Cir. 1972); *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

[5]*See* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971). *See also* authorities cited note 2 *supra*. The general contempt power of the federal courts is contained in 18 U.S.C. §§ 401-02 (1970). Section 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

This provision has withstood an attack on its constitutionality as being too vague and indefinite, and therefore violative of the due process clause of the fifth amendment. *See* United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970).

cases,[6] this Article is limited to a consideration of the contempt power exercised by the federal courts, particularly in the enforcement of injunctive orders in patent cases. Such a consideration, however, requires a brief review of the general contempt power of the federal courts.

II. Contempt — What Is It?

Contempt has historically been treated as a sui generis judicial power,[7] but recent language of the United States Supreme Court seems to indicate a change in attitude to the extent of treating criminal contempt like all other crimes.[8] Although language can be found in some cases expressing the view that courts possess the inherent power to punish for contempt,[9] the contempt power of the federal courts clearly is subject to congressional regulation.[10] Because of the importance of the contempt power to an effective judicial system, it is unfortunate that the law of contempt remains in a confused and rather uncertain state. Although some courts do not bother with such distinctions, contempts have been variously classified as "direct" or "indirect" and as civil or criminal.[11] While the labels are not too important, "direct" contempts are those committed in the presence of the court while "indirect" contempts refer to all others.[12] Since violations of injunctive relief in patent cases do not occur in the presence of

---

[6] 28 U.S.C. § 1338(a) (1970), *as amended*, (Supp. II, 1972).

[7] *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966); Green v. United States, 356 U.S. 165 (1958); Myers v. United States, 264 U.S. 95 (1923); United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970).

[8] *See* Bloom v. Illinois, 391 U.S. 194 (1968), in which the Court held the sixth amendment right to jury trial applicable to serious criminal contempts. In so holding, the Court stated:

> Criminal contempt is a crime in the ordinary sense. . . . There is no substantial difference between serious contempts and other serious crimes.

Id. at 201-02.

[9] *See* Shillitani v. United States, 384 U.S. 364 (1966); *In re* Williams, 306 F. Supp. 617 (D.D.C. 1969); *In re* Curtis, 240 F. Supp. 475 (E.D. Mo. 1965), *aff'd sub nom.* Ford v. Boeger, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967).

[10] Michaelson v. United States *ex rel.* Chicago, St. P.M. & O. Ry., 266 U.S. 42 (1924).

[11] *See* authorities cited note 2 *supra.*

[12] *See* United States v. Peterson, 456 F.2d 1135 (10th Cir. 1972); R. Goldfarb, *supra* note 2.

the court, contempts considered hereinafter will be in the category of "indirect" contempts, both civil and criminal.

Until the Supreme Court decision in the case of *Gompers v. Buck's Stove & Range Co.*,[13] the basic and important distinction between civil and criminal contempt was variously defined, if recognized at all. The Court in *Gompers* recognized that "contempts are neither wholly civil nor altogether criminal"[14] but established the now generally accepted "purpose of the punishment" test. This test treats a contempt as "civil" when the punishment is wholly remedial and serves only the purposes of the complainant and classifies a contempt as "criminal" when the punishment is punitive and designed to vindicate the authority of the court.[15] Obviously, civil contempt will, in addition to being remedial, vindicate the authority of the court, and a criminal contempt judgment, while punitive in nature, may serve the interests of the private litigant to some degree.[16] Although the "punitive" and "remedial" test has been the accepted distinction in contempt cases since *Gompers*, it leaves the question of whether conduct is criminal or civil to a large degree in the discretion of the complainant and the court to determine after the fact.[17]

---

[13]221 U.S. 418 (1910).

[14]*Id.* at 441.

[15]*Id.* at 447.

[16]*Id.* at 443. In fact, the threat of a criminal charge may be more coercive than any civil remedy the private litigant has, particularly when the monetary damages may not justify the expense of pursuing a civil remedy. If a criminal charge is instituted, the United States Attorney's office may bear the expense and burden of enforcing the injunction.

[17]*E.g.*, Backo v. Local 281, United Bhd. of Carpenters & Joiners, 438 F.2d 176 (2d Cir. 1970); Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968). Goldfarb, in referring to the attempted distinction between civil and criminal contempt, states:

> These formulas for distinction afford no clear guide for the actor, who cannot know whether his conduct goes so far as to interfere with a law in general, or whether it is merely an interference with a private party who is an adjunct to the administration of law. The greatest percentage of cases of contempt could fall into either category, depending not upon the application of . . . formulas, but upon the discretion of the particular decision-maker. Not only does this do havoc to the law of contempt, but it also violates a strong principle of criminal law which directs that a law be clear enough to forewarn all potential violators of the consequences of their future acts.

R. GOLDFARB, *supra* note 2, at 53. Professor Moore states:

> Attempts to draw a definitional line between civil and criminal contempt have met with great conceptual difficulty. The failure of

Historically, the courts have primarily treated certain offenses as criminal, the "direct" contempts.[18] On the other hand, such acts as disobedience to judgments, orders or court processes and the like have generally been considered civil contempt only.[19] However, criminal contempt has been used as a sanction for violation of injunctive decrees in a few patent cases, and it clearly is a proper sanction in such instances.[20] Civil contempt is more commonly employed as a sanction in patent cases probably because proceedings in such cases are usually initiated by the private litigant who is generally more concerned with his own interest than with vindication of the court's authority.[21]

> definition may result in serious practical consequences. The need is to determine the nature of the proceeding at the outset so that the proper procedure may be followed. . . .

8A J. MOORE, FEDERAL PRACTICE § 42.02[2], 42-8 (2d ed. 1972). Moskovitz, *supra* note 2, at 785-801, sets forth a number of factors considered by the courts in attempting to make the distinction.

[18]R. GOLDFARB, *supra* note 2, at 67.

[19]*Id.*

[20]The only reported cases located by the author in which criminal contempt was clearly charged for violation of an injunction in a patent case are: United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970), and Kreplik v. Couch Patents Co., 190 F. 565 (1st Cir. 1911). However, the Supreme Court in discussing civil and criminal contempt, stated:

> Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice. Litigation in patent cases has frequently followed this course. . . .

United States v. United Mine Workers, 330 U.S. 258, 299 (1947). The cases cited by the Court involved contempt judgments in which a portion of the fine was payable to the United States with the remaining portion payable to the private litigant. In none of the cited cases did the court draw a clear distinction between what constitutes "criminal" contempt and what amounts to "civil" contempt. The courts, however, did refer to the "remedial" and "punitive" aspects of the fine. The Supreme Court in *United Mine Workers* did approve the procedure of conducting both the criminal and civil contempts in a single proceeding as long as the criminal nature of the proceeding dominates and the defendant's rights in the criminal trial are not diluted by the mixing of the civil and criminal aspects. As pointed out later in this Article, the better procedure may be separate trials with the criminal trial conducted first. In any event, these cases are good examples of what Goldfarb referred to in discussing contempts when he said, "Nowhere is there such recurring confusion and mistake. . . ." R. GOLDFARB, *supra* note 2, at 49.

[21]In Yates v. United States, 355 U.S. 66 (1957) (not a patent case), the Court said:

> The more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey

III. The Crime of Patent Infringement

Because "criminal contempt is a crime in the ordinary sense,"[22] a party who has been enjoined from future patent infringement may find an otherwise clean criminal record tarnished if he ignores the terms of the injunction. Criminal contempt is a particularly drastic trap for the unwary since patent infringement litigation is not infrequently settled by the parties with the alleged infringer permitting the entry of a consent decree enjoining him from future infringement. Whether right or wrong, the courts draw no distinction in contempt cases between the effect of a decree entered by consent and one entered after a complete and contested proceeding.[23] Thus, the uninformed party who casually agrees to what he believes is merely a settlement arrangement between private litigants may be shocked to learn that he faces the prospect of joining the ranks of the white-collar criminals. Although the unsuspecting violator of the injunction is entitled to the same basic constitutional safeguards as he would receive in any ordinary criminal proceeding,[24] this may be little consolation to him if he is found guilty.

---

its orders, and only make use of the more drastic criminal sanctions when the disobedience continues.

Id. at 75. In attempting to decide which sanction to apply, some courts wander off into the "mandatory" — "restraining" jungle. *See, e.g.*, Michaelson v. United States *ex rel.* Chicago, St. P.M. & O. Ry., 266 U.S. 42 (1924). This distinction is based on the theory that civil contempt can be coercive (and thus not "criminal") when a mandatory injunction is violated because the violator can be imprisoned until he does the required act, *i.e.*, he has the keys to his prison cell. However, when the injunction is "restraining" in nature (as it normally is in patent cases), a violation cannot be undone and the only proper sanction is criminal contempt. This obvious misclassification adds to the confusion and has been rejected in many cases. *See* Moskovitz, *supra* note 2, at 792.

[22]*See* Bloom v. Illinois, 391 U.S. 194, 201 (1968).

[23]*E.g.*, United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970); Siebring v. Hansen, 346 F.2d 474 (8th Cir.), *cert. denied*, 382 U.S. 943 (1965); Kiwi Coders Corp. v. Acro Tool & Die Works, 250 F.2d 562 (7th Cir. 1957).

[24]*See* Bloom v. Illinois, 391 U.S. 194 (1968); United States v. Seale, 461 F.2d 345 (7th Cir. 1972). Fed. R. Crim. P. 42(b) provides:

> Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the

A criminal contempt proceeding in a federal court must be prosecuted in accordance with rule 42 of the Federal Rules of Criminal Procedure.[25] In the case of an indirect criminal contempt, subdivision (b) of this rule provides for notice and hearing, and such proceedings may be instituted by an order to show cause granted *ex parte* upon application of the complainant.[26] Rule 42(b) also provides for a trial by jury "in any case in which an act of Congress so provides," and the Supreme Court, in accordance with the general trend to protect individual rights, has determined that there is a right to trial by jury in any criminal contempt case in which the penalty actually imposed exceeds that allowed for commission of a "petty offense."[27] The action can be prosecuted by the United States in which case the matter must be handled by a representative of the United States At-

---

> United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

However, there is no requirement of indictment by a grand jury in a criminal contempt proceeding even though the violation is tried as a serious offense. Green v. United States, 356 U.S. 165 (1958); United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970).

[25]Backo v. Local 281, United Bhd. of Carpenters & Joiners, 438 F.2d 176 (2d Cir. 1970) (but failure to comply with the rule not fatal if no substantial prejudice results). *See also* United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970).

[26]*See* FED. R. CRIM. P. 42(b), *supra* note 24.

[27]Frank v. United States, 395 U.S. 147 (1969); Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966); United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970). A "petty offense" is defined in 18 U.S.C. § 1(3) (1970):

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

The foregoing cases, however, emphasize that Congress has prescribed no maximum penalty for contempts and has not categorized contempts as "serious" or "petty." Therefore, the severity of the penalty *actually imposed* determines the seriousness of the particular offense, and thus the right to a jury trial. If a jury is demanded and refused, the court cannot impose a sentence in excess of that allowed by 18 U.S.C. § 1(3) (1970). *See* Frank v. United States, *supra*; Cheff v. Schnackenberg, *supra*.

torney's Office.[28] However, more frequently than not, prosecution is declined by the United States Attorney and the action is prosecuted on behalf of the United States with the complainant's attorney appointed as a special prosecutor.[29] However, this procedure has been criticized by at least one court.[30]

---

[28]28 U.S.C. § 547 (1970) provides:

> Except as otherwise provided by law, each United States Attorney, within his district, shall — (1) prosecute for all offenses against the United States.

This is the exclusive duty of the United States Attorney and if he declines to prosecute, the court cannot force him to do so. United States v. Woody, 2 F.2d 262 (D. Mont. 1924); United States v. Stone, 8 F. 232 (C.C.W.D. Tenn. 1881).

[29]*See* Moskovitz, *supra* note 2, at 810.

[30]With respect to the use of private counsel in criminal contempt cases, the court in Brotherhood of Locomotive Firemen & Enginemen v. United States, 411 F.2d 312 (5th Cir. 1969), observed:

> As we look objectively at this record there is no doubt concerning the genesis of this due process deficiency. It flows directly from the fact that the governance of the whole criminal contempt proceeding was delivered into the hands of counsel for private parties, not the National Sovereign. This transcends the matter of competence, character and professional trustworthiness. Indeed, it is the highest claim on the most noble advocate which causes the problem — fidelity, unquestioned, continuing fidelity to the client. For while we would readily agree on this record that none of these distinguished counselors would have perverted a demand of the law in the prosecution of these respondents simply because it was detrimental to the interest of their railroad clients, the fact is that, continuing as they are in the related *merits*, case . . . to the vigorous support of the Carriers' positions, they have a duty faithfully to assert every — the word is every — contention, refute every — the word is every — counter contention which they may legitimately and honorably do, which is disadvantageous to their carrier clients in this controversy. One such objective is to marshal and generate — through court orders if obtainable — pressures which will, or may, bring the Brotherhood earlier to book. To move fast, to get punitive orders which might put the Brotherhood in an awkward or disadvantageous position was therefore a desired goal. . . .
>
> It is the experience of this Court that the National Sovereign, through its chosen law officers, should be in control of criminal contempt proceedings. Only in this way can we have the assurances that the contentions, both factual and legal of the prosecution are thought by responsible governmental officials to be the policy that the court should adopt. . . .
>
> We therefore vacate the judgment of conviction and the order . . . appointing carrier counsel as prosecutors. On remand, the Dis-

Because the purpose of the criminal contempt proceeding is to vindicate the authority of the court, it is no defense to the contempt charge that subsequent to commission of the acts constituting contempt the court order or decree violated was set aside, held invalid, or modified.[31]

A criminal contempt proceeding is a crime "in the ordinary sense,"[32] and therefore the acts of the accused must be shown beyond a reasonable doubt to have been willful and deliberate.[33] There is some authority to the effect that there must be a finding of a specific criminal intent to violate the decree and that the necessary intent will not be imputed from the mere fact of violation.[34]

---

trict Court, if it determines that the prosecution should go forward, should designate the United States Attorney and his Assistants.

Id. at 319-20.

[31]Walker v. Birmingham, 388 U.S. 307 (1967); United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Hammond, 419 F.2d 166 (4th Cir. 1969), *cert. denied*, 397 U.S. 1068 (1970). *See also* United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970), in which the court held that in a criminal contempt proceeding the decree enjoining infringement of a patent is not subject to attack on the basis that the patent is invalid. The court in *Barco* indicated that the rule rested on the principle of res judicata which bars collateral challenges to the decree. The court went further to state that even if the decree were subject to collateral attack and a showing were made as to the invalidity of the patent, this would not excuse otherwise criminally contemptuous conduct. *Id.* at 1002 n.8. Apparently, the public policy of vindicating the court's authority overrides any strong public policy requiring all ideas and inventions within the public domain to be available for use by everyone.

[32]*See* note 8 *supra*.

[33]Panico v. United States, 375 U.S. 29 (1963); *In re* Brown, 454 F.2d 999 (D.C. Cir. 1971); Sykes v. United States, 444 F.2d 928 (D.C. Cir. 1971); United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970). *See* Moskovitz, *supra* note 2; Note, *The Intent Element in Contempt of Injunctions, Decrees and Court Orders*, 48 MICH. L. REV. 860 (1950).

[34]*E.g.*, Morissette v. United States, 342 U.S. 246 (1951) (finding of specific intent to commit crime required); Screws v. United States, 325 U.S. 91 (1944) (evil motive required); Hargrove v. United States, 67 F.2d 820 (5th Cir. 1933) (specific intent); United States v. Schneiderman, 102 F. Supp. 87 (S.D. Cal. 1951) (specific intent). *But cf.* United States v. Wefers, 435 F.2d 826 (1st Cir. 1970) (intent inferred from violation of plain, unmistakable language of order). The precise meaning of the word "willful" in a criminal action, including criminal contempt actions, is beyond the scope of this Article. However, the reader might find the following statement in *Screws* useful:

> We recently pointed out that "willful" is a word of many meanings, its construction often being influenced by its context. Spies v.

A finding of guilty in a criminal contempt proceeding may result in either a fine[35] or imprisonment, or both.[36] If imprisonment is ordered, it must be for a definite term.[37] If the guilty party is subjected to a punitive fine, it is payable to the United States, but when the contemptuous conduct is itself also a criminal offense, section 402 invests the court with the power to order the fine paid in part to the complainant or to some person injured by the contemptuous conduct.[38] Violation of an injunction in a patent case would rarely involve a separate criminal offense since patent infringement is not a crime, but it is possible that a sale of an infringing article could also be in violation of some

---

> United States, 317 U.S. 492. . . . At times, as the Court held in United States v. Murdock, 290 U.S. 389 . . . the word denotes an act which is intentional rather than accidental. . . . But when used in a criminal statute it generally means an act done with a bad purpose. . . . In that event something more is required than the doing of the act prescribed by the statute. *Cf.* United States v. Balint, 258 U.S. 250. . . . An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.

325 U.S. at 101.

[35]Since a fine imposed in a criminal contempt proceeding is not a debt within the meaning of the Bankruptcy Act, 11 U.S.C. § 1 *et seq.* (1970), liability for the fine is not affected by a discharge in bankruptcy. Parker v. United States, 153 F.2d 66 (1st Cir. 1946).

[36]18 U.S.C. §§ 401-02 (1970).

[37]Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1910); Parker v. United States, 153 F.2d 66 (1st Cir. 1946).

[38]18 U.S.C. § 402 (1970) provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Michaelson v. United States *ex rel.* Chicago, St. P.M. & O. Ry., 266 U.S. 42 (1924). In a proceeding under section 402, the discretion to divide the fine among private parties does not alter the essential nature of the proceedings as one of criminal contempt. As stated by the Court in *Michaelson*:

> The discretion given the Court in this respect is incidental and subordinate to the dominating purpose of the proceeding, which is punitive, to vindicate the authority of the Court and punish the act of disobedience as a public wrong.

Id. at 65.

regulatory provision that carries a criminal sanction.[39] If so, it could be argued that the provisions of section 402 are applicable.[40] In the usual case, however, if the court does divide the fine, it should be because the court has determined that the proceeding involves both civil and criminal contempt,[41] but this is not always the case. In the more recent cases the courts have attempted to draw a clearer definitional line between the criminal and civil aspects, but confusion persists.[42]

A criminal contempt proceeding can be instituted by the private litigant who benefited from the order allegedly violated; but before he takes steps to commence such a proceeding, complainant should consider the possibility of being subjected to a malicious prosecution action in the event the accused is found not guilty of criminal contempt.[43] Under the "purpose of punish-

---

[39]For example, the sale of an infringing article could also be falsely marked and therefore a violation of the false marking provisions of 35 U.S.C. § 292 (1970), which carries a fine of $500 for each such offense. Also, sale of an infringing product could be in violation of one of the many federal regulatory acts such as the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (1970).

[40]Whether or not any benefit would be derived from urging the court to apply section 402 is questionable. However, since section 402 does provide for apportioning of any punitive fines among the United States, the complainant or any other party, perhaps the private litigant may find that this serves his interest in a remedial way as well as the public in a punitive way. *See* note 16 *supra* & accompanying text.

[41]United States v. United Mine Workers, 330 U.S. 258 (1947). In this case the Court said:

> Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify the Court in resorting to coercive and to punitive measures. Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice. Litigation in patent cases has frequently followed this course. . . .

Id. at 299. However, as noted earlier, the patent cases cited by the Court in support of this statement do not evidence a clear distinction between criminal and civil contempt. *See* note 20 *supra*. Although the cases are anything but recent, the reader may wish to review these cases which include: Union Tool Co. v. Wilson, 259 U.S. 107 (1922); *Re* Christensen Eng'r Co., 194 U.S. 458 (1904); Wilson v. Byron Jackson Co., 93 F.2d 577 (9th Cir. 1937); Kreplik v. Couch Patents Co., 190 F. 565 (1st Cir. 1911).

[42]*See* note 17 *supra* & accompanying text.

[43]Since criminal contempt is a "crime" in the ordinary sense, note 8 *supra*, the principles of malicious prosecution should apply to criminal contempt in the same manner as they do for unjustified charges in ordinary criminal actions.

ment" test, the drastic and severe sanction of branding an unsuspecting actor as a criminal should not be imposed simply to further the interest of a private litigant and should be used only in a proper case.[44] Perhaps in some jurisdictions the threat of malicious prosecution will be sufficient deterrent to the unwarranted criminal contempt charge.[45]

IV. Civil Contempt — A Profitable Pursuit

A federal civil contempt proceeding is conducted under the same statutory authority as a criminal contempt proceeding.[46] Although the statute appears in the criminal section of the United States Code, it has been held that it covers civil as well as criminal contempt proceedings.[47] In a proper case, the same acts may give rise to both criminal and civil contempt, both of which may be considered in a single proceeding.[48] If it appears to the com-

---

[44]In Yates v. United States, 355 U.S. 66 (1957), the Court stated:

> The more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues.

Id. at 75. *Cf.* One-Two-Three Co. v. Tavern Fruit Juice Co., 54 F. Supp. 574 (E.D.N.Y. 1944), in which the court said:

> My only opinion is that the facts do not show an intentional violation of the decree by defendant, but assuming the most favorable view for plaintiff of what defendant has done plainly a reasonable doubt as to wrongful conduct on the part of the defendant arises, in which case the process of contempt should not be resorted to to enforce plaintiff's right but plaintiff should be relegated to a suit for alleged infringement.

Id. at 577. *See also* R. Goldfarb, *supra* note 2, at 52:

> Whether the law of contempt is good or bad, the argument is even stronger against contempt proceedings in essentially civil matters, which are rarely treated with criminal sanctions or followed by criminal stigmas.

[45]*See* note 43 *supra.*

[46]*See* 18 U.S.C. § 401 (1970) which is set out in note 5 *supra.*

[47]United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970). Section 401 has been applied to civil contempt proceedings in a number of cases, but the *Barco* case is apparently the first case in which the issue was specifically raised as to its applicability and constitutionality.

[48]*See* note 40 *supra.* Also, it is clear that if a single act gives rise to both civil and criminal contempt with resulting sentences, the presence of both coercive and punitive sanctions raises no double jeopardy problem. Yates v. United States, 355 U.S. 66 (1957); Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States v. United Mine Workers, 330 U.S. 258 (1946).

plainant that both proceedings are proper, there may be some advantage in instituting both proceedings simultaneously but conducting the criminal contempt proceeding first. Because the burden of proof and degree of requisite intent are greater in the criminal proceeding,[49] a finding of guilty may be conclusive of the issue of contempt in the civil proceeding. The record in the criminal contempt proceeding may, in some instances, be admitted in evidence in the civil proceeding[50] thereby shortening the trial and allowing the parties to concentrate on the introduction of evidence relating to the issue of the amount of the compensatory fine.

There are no specific rules or statutes prescribing the procedure for civil contempt, and the Federal Rules of Civil Procedure are generally applicable.[51] In a civil contempt proceeding, the contemnor cannot avail himself of the privilege against self-incrimination.[52] Also, when both criminal and civil contempt proceedings are conducted simultaneously, the complainant may have a distinct advantage in that he can employ the search warrant[53] in the criminal proceeding to obtain evidence not obtainable in a civil proceeding while using the broad discovery rules in the civil proceeding to obtain evidence not otherwise obtainable but very useful in the criminal proceeding. On the other hand, the con-

---

[49]As in an ordinary criminal case, the accused must be proved guilty beyond a reasonable doubt. *See* authorities cited note 33 *supra*. On the other hand, in a civil contempt proceeding, the proof need not be beyond a reasonable doubt, although it should be clear and convincing. *See* Moskovitz, *supra* note 2, at 819. Moreover, there is no requirement of "willfullness" in a civil contempt proceeding. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1948); United States v. United Mine Workers, 330 U.S. 258 (1946); NLRB v. Teamsters Local 282, 428 F.2d 994 (2d Cir. 1970). *Cf.* Matthews v. Spangenberg, 15 F. 813 (C.C.S.D.N.Y. 1883), in which the court refused to punish the contemnor because the act was not at all willful or defiant, but the court "sentenced" him to pay damages sustained by the patent owner. The court did not discuss the distinction between the criminal and civil aspects of the case.

[50]*See* Carruba v. Transit Cas. Co., 443 F.2d 260 (6th Cir. 1971); Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267 (S.D. Cal. 1971). It may be in the best interests of all parties involved in the civil proceeding to stipulate as to admission of the criminal transcript in order to save trial time and expense.

[51]*See Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 170 (1950).

[52]Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1910). *See* Parker v. United States, 153 F.2d 66 (1st Cir. 1946); Moskovitz, *supra* note 2, at 819.

[53]FED. R. CRIM. P. 41.

temnor cannot be forced to testify in the criminal contempt proceeding,[54] and if both criminal and civil contempt are pending simultaneously or are being conducted in a single proceeding, the cautious prosecutor may decide to defer deposing the contemnor until after final adjudication of the criminal proceeding.[55]

---

[54]*See* authorities cited note 52 *supra.*

[55]In the civil action of Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964), plaintiff sought discovery from a criminal defendant and the court stayed such discovery pending determination of the criminal proceeding because it would violate the defendant's privilege against self-incrimination. However, in United States v. Simon, 373 F.2d 649 (2d Cir. 1967), the court of appeals held that a trustee in bankruptcy in a civil suit should not have been enjoined from deposing defendants in a pending criminal proceeding that arose out of the same transactions as the civil proceeding. The court reasoned that the defendants could exercise their privilege against self-incrimination if they so chose. The *Simon* case reached the Supreme Court and the judgments of both lower courts were vacated as moot on a joint motion to vacate. Simon v. Wharton, 389 U.S. 425 (1967). *See also In re* Commonwealth Fin. Corp., 288 F. Supp. 786 (E.D. Pa. 1968); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1052-53 (1967). However, discovery can proceed in a civil contempt proceeding when the discoverable matter bears no direct connection with individual criminal defendants. In Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 269 F. Supp. 540 (E.D. Pa. 1967), *cert. denied*, 490 U.S. 931 (1968), the court in a civil anti-trust action denied a motion by the defendants to stay all discovery proceedings pending termination of a related criminal anti-trust action against the same defendants. Subsequently, the court in which the court in a civil antitrust action denied a motion by the defendants to further discovery proceedings in the civil antitrust action, but this order was appealed and the court of appeals reversed. United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968). In reversing, the court of appeals said:

> The claim of deprivation of constitutional right is not well taken. Admittedly, no effort has been made to take the depositions of the individual criminal defendants, nor is there reason to anticipate any such effort. And should any such effort be made in the court in the civil action and if necessary, this court can be relied upon to protect the constitutional right.

Id. at 204. *But cf.* Texaco, Inc. v. Borda, 383 F.2d 607 (3d Cir. 1967), in which the court held that the district court did not abuse its discretion in staying discovery in the civil action until termination of the criminal action. However, the court quoted with approval the following reason given by the district court for the stay:

> The indicted defendants should not be unduly hampered, as I believe they would be if they had to fight on two fronts at the same time. We are not dealing here with the ordinary run-of-the-mill litigation. We are dealing with an anti-trust suit covering alleged illegal activity in a three-state area, going back many years.

Id. at 608-09. On the other hand, it seems clear that the defendants in the criminal action cannot conduct discovery in the civil action of either

Once a patent dispute is settled by a final adjudication, including a consent decree, the courts are generally in agreement that the issues of infringement and validity cannot be relitigated in a civil contempt proceeding.[56] To allow such issues to be raised

---

the prosecution's case or the prosecution's witnesses. *See* United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (S.D.N.Y. 1966); United States v. Steffes, 226 F. Supp. 51 (D. Mont. 1964); United States v. $2437.00 United States Currency, 36 F.R.D. 257 (E.D.N.Y. 1964). This restriction on discovery by a defendant in a criminal case is for the purpose of preventing a criminal defendant from discovering the prosecution's case while resisting discovery by the prosecution on the claim of privilege against self-incrimination.

[56]United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970); Siebring v. Hansen, 346 F.2d 474 (8th Cir.), *cert. denied*, 382 U.S. 943 (1965); Hopp Press, Inc. v. Joseph Freeman & Co., 323 F.2d 636 (2d Cir. 1963); Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 338 F. Supp. 1240 (W.D. Mich. 1972). The *Siebring* case, *supra*, cited a number of cases from other circuits to the same effect. *Cf.* Broadview Chem. Corp. v. Loctite Corp., 406 F.2d 538 (2d Cir.), *cert. denied*, 394 U.S. 976 (1969), in which the defendant appealed from a finding that it was in contempt of a consent decree enjoining patent infringement and argued that the lower court "mistakenly failed to consider the prior art." *Id.* at 541. The court of appeals rejected this argument by comparing the alleged contemptuous acts with the acts previously adjudged to infringe, and finding no substantial difference, the court held that infringement in the contempt proceedings was res judicata thereby precluding consideration of the prior art. To the same effect are: McCullough Tool Co. v. Well Surveys, Inc., 395 F.2d 230 (10th Cir.), *cert. denied*, 393 U.S. 925 (1968); Warner v. Tennessee Prod. Corp., 57 F.2d 642 (6th Cir.), *cert. denied*, 287 U.S. 632 (1932). Although the issue was not discussed in either of the decisions of the court of appeals, the reader's attention is directed to Chemical Cleaning, Inc. v. Dow Chem. Co., 379 F.2d 294 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968), and 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). In this litigation the contemnor subsequently petitioned the Supreme Court for certiorari on the basis of Lear v. Adkins, 395 U.S. 653 (1969), and argued that the policy espoused in *Lear* gives a patent no greater stature with respect to validity in a consent decree than it does in a license agreement. However, the Court denied certiorari. 389 U.S. 1040 (1971). *But cf.* Ransburg Electro-Coating Corp. v. Ionic Electrostatic Corp., 395 F.2d 92 (4th Cir. 1968), *cert denied*, 393 U.S. 1018 (1969), in which the court reversed an order holding defendant in civil contempt of an injunctive order for continuing to sell and use devices allegedly proscribed by the terms of the injunction. In reversing the contempt finding, the court stated that "[i]n light of the prior art, which the patentee has no right to appropriate, we think the finding erroneous." *Id.* at 93. In the *Ransburg* case, the alleged contemnor changed the device. The issue in the contempt proceeding was whether or not the new device was the equivalent of the old device and therefore subject to the injunction. The court, therefore, reviewed the prior art which it considered essential to its understanding of the problem and concluded that the acts of the contemnor did not constitute an infringement because they were substantially the same as those of the prior art. *See also*

in a later civil contempt proceeding would be to allow a collateral attack on the decree.[57] Although the trend-setting case of *Lear v. Adkins*[58] opened the door to an attack on patent validity in many areas,[59] the courts to date have refused to apply the principles of *Lear* to civil contempt proceedings.[60] However, in a proper case, the contemnor may have grounds to make a direct attack on the judgment under Federal Rule of Civil Procedure 60(b).[61] Particularly, such a direct attack on a decree may be permitted to raise the validity issue.[62] In such an attack, the

---

General Mfg. Corp. v. Gray, 48 F.2d 602 (D. Okla. 1931), in which the court held that prior art patents are admissible in a contempt action in order to determine whether or not the device alleged to be in violation of the injunction was merely a colorable imitation or not. To the same effect is Blanc v. Weston, 109 F.2d 911 (8th Cir. 1940), in which the court dismissed a contempt action upon a showing that the alleged contemptuous sales were of a device shown to be part of the prior art. *See* Galion Iron Works Mfg. Co. v. Beckwith Mach. Co., 105 F.2d 941 (3d Cir. 1939) (not a contempt proceeding), in which the court said: "If the accused machine is substantially identical with the prior art, there can be no infringement." *Id.* at 942.

[57]*See* cases cited note 56 *supra.*

[58]395 U.S. 653 (1969).

[59]*E.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1970) (estoppel of prior adjudication affecting validity of patent); Massillon-Cleveland-Akron Sign Co. v. Golden State Advertising Co. 444 F.2d 425 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971) (settlement agreement not to contest validity void and unenforceable); Butterfield v. Oculus Contact Lens Co., 332 F. Supp. 750 (N.D. Ill. 1971) (earlier consent judgment acknowledging validity no estoppel to future attack on validity). Numerous articles have been written on the effects of the *Lear* case, and from the foregoing decisions it appears that its impact will be felt for many years to come.

[60]*See* note 56 *supra.*

[61]FED. R. CIV. P. 60(b) provides in part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[62]This was suggested in Ransburg Electro-Coating Corp. v. Ionic Electrostatic Corp., 395 F.2d 92 (4th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969),

principles of *Lear* may well open the door more easily than in the past. If grounds under rule 60(b) exist, the contemnor may well find it to his advantage to proceed promptly with an attack on patent validity under the rule prior to trial of the civil contempt proceeding, since there is some authority that the court has discretion to decline to hold a party in civil contempt if the decree is erroneous in any respect.[63] Unlike a criminal contempt proceeding in which the court's authority must be vindicated even though there is a subsequent modification of the decree upon which the contempt is based,[64] the remedial aspect of the civil proceeding may well convince the court that there should be no compensatory fine when the injunctive decree is no longer valid.[65]

The remedial nature of a civil contempt proceeding requires that any fine awarded to the complainant be based upon some

---

in which the contemnor made a preliminary showing with respect to newly discovered prior art relevant to validity of the patent. In reversing the finding of contempt, the court noted that in light of the prior art the contemnor's devices were not infringing and therefore there was no contempt, and the court suggested that the remand would be

> with leave to the District Court to consider any such application that may be made to it and to reopen its prior judgment . . . and to enter any modifying or substitute order which may seem appropriate.

Id. at 97. *See* United States v. Swift & Co., 286 U.S. 106 (1931), in which the Court stated:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. . . . A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

Id. at 114-15. *See also* L.M. Leathers' Sons v. Goldman, 252 F.2d 188 (6th Cir. 1958), in which the court granted a motion under rule 60(b) to set aside a consent judgment and injunction and proceeded to hold invalid the patent at issue.

[63] *See* United States v. United Mine Workers, 330 U.S. 258, 295 (1947); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 451-52 (1910).

[64] *See* note 31 *supra.*

[65] *See* cases note 63 *supra. Cf.* King Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31 (2d Cir. 1969) (trademark case); L.M. Leathers' Sons v. Goldman, 252 F.2d 188 (6th Cir. 1958); Coca Cola Co. v. Standard Bottling Co., 138 F.2d 788 (10th Cir. 1943) (trademark case). *But cf.* Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803 (8th Cir.), *cert.*

showing of actual injury or loss.[66] Unless the award is based upon such injury or loss, the award becomes punitive rather than remedial.[67] However, in a proper case, such loss or injury may be shown inferentially by the fact that the complainant is the patent owner and is thus the only proper source for the patented product.[68] In such a case, there exists the reasonable probability that a violation of the injunction against future infringement by the manufacture or sale of the patented product deprived the complainant of sales he would have otherwise made.[69] In most patent cases then, the burden of the complainant to show actual

---

denied, 395 U.S. 905 (1969) (trademark case); National Popsicle Corp. v. Hughes, 32 F. Supp. 397 (N.D. Cal. 1940).

[66]United States v. United Mine Workers, 330 U.S. 258 (1947), in which the Court stated:

> Where compensation is intended, a fine is imposed payable to the complainant. Such fine must, of course, be based upon evidence of complainant's actual loss. . . .

Id. at 304. Judelshon v. Black, 64 F.2d 116 (2d Cir. 1933); Norstrom v. Wahl, 41 F.2d 910 (7th Cir. 1930).

[67]National Drying Mach. Co. v. Ackoff, 245 F.2d 192 (3d Cir.), *cert. denied,* 355 U.S. 832 (1957); Parker v. United States, 153 F.2d 66 (1st Cir. 1946); Christensen Eng'r Co. v. Westinghouse Air Brake Co., 135 F. 774 (2d Cir. 1905). In National Drying Mach. Co. v. Ackoff, *supra,* the court stated:

> Though such an award is made against a wrongdoer adjudged guilty of civil contempt, we think the burden of showing what amount, if anything, the plaintiff is entitled to recover by way of compensation, cannot properly be shifted in this way from plaintiff to defendant. . . . There is no suggestion in the present proceeding that this absence of economic injury has been changed by the contemptuous conduct of the defendant. The District Court does say that the equities have been changed by this willful misconduct. But there can be no "equity" in a compensatory award except as it provides a fair equivalent for some loss. If on the other hand, the reference to changed "equities" means that the defendant deserved punishment for willful wrong, the procedure must be that of criminal contempt rather than the employment of civil contempt as a punitive device.

Id. at 194-95.

[68]*See* Livesay Window Co. v. Livesay Indus., Inc., 251 F.2d 469 (5th Cir. 1958); Electric Pipe Line v. Fluid Sys., Inc., 250 F.2d 697 (2d Cir. 1957); Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 F. 199 (3d Cir.), *cert. denied,* 238 U.S. 623 (1915); Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447 (D. Conn. 1970).

[69]*Cf.* National Drying Mach. Co. v. Ackoff, 245 F.2d 192, 194 (3d Cir.), *cert. denied,* 355 U.S. 832 (1957). *See also* Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 469-70 (2d Cir. 1958).

loss or injury by reason of contemnor's acts of infringement appears relatively easy to sustain once the fact of contemptuous conduct is shown.

However, the determination of the amount of the loss, and thus the amount of the fine, presents complainant with some difficult issues and proof problems. It appears settled that the complainant is entitled to the contemnor's profits from sales of any products made in violation of the injunction against infringement.[70] This is true even though "profits" of the infringer are not recoverable in the ordinary patent infringement action,[71] for the courts have ruled that the damages provision, 35 U.S.C. section 284, is not applicable to civil contempt proceedings for enforcement of an injunctive decree against infringement.[72] But the refusal of

---

[70]Leman v. Krentler-Arnold Hinge Last Co. 284 U.S. 448 (1932); Blatz v. Walgreen Co., 198 F. Supp. 22 (W.D. Tenn. 1961); Town v. Willis, 89 F. Supp. 437 (W.D. Mo. 1950). *But cf.* National Drying Mach. Co. v. Ackoff, 245 F.2d 192 (3d Cir.), *cert denied,* 355 U.S. 832 (1957), in which the court stated that "the Leman case does not relieve the complainant of showing that the contemptuous conduct did, in fact, have substantial injurious effect upon his economic interest." *Id.* at 194. *See also* Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447 (D. Conn. 1970); Georgia Pac. Corp. v. United States Plywood Corp., 243 F. Supp. 500, 541 (S.D.N.Y. 1965) (not a contempt case). *Cf.* Dow Chem. Co. v. Chemical Cleaning Inc., 434 F.2d 1212 (5th Cir. 1970), *cert. denied,* 402 U.S. 945 (1971).

[71]35 U.S.C. § 284 (1970). This section has eliminated the recovery of "profits" as opposed to "damages" since the statute was amended in 1946. Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964), in which the Court stated:

> The purpose of the change was precisely to eliminate the recovery of profits as such and allow the recovery of damages only. . . . There can be no doubt that the amendment succeeded in effectuating this purpose; it is clear that under the present statute only damages are recoverable. . . . These have been defined by this Court as compensation for the pecuniary loss he (the patentee) has suffered from the infringement, without regard to the question of whether the defendant has gained or lost by his unlawful acts. . . .

Id. at 505-07. To the same effect is Marvel Specialty Co. v. Bell Hosiery Mills, Inc., 386 F.2d 287 (4th Cir. 1967), *cert. denied,* 390 U.S. 1030 (1968); Georgia Pac. Corp. v. United States Plywood Corp., 243 F. Supp. 500 (S.D.N.Y. 1965). *Cf.* Zegers v. Zegers, Inc., 458 F.2d 726 (7th Cir. 1972).

[72]Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212 (5th Cir. 1970), *cert. denied,* 402 U.S. 945 (1971); Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447 (D. Conn. 1970). *But cf.* National Drying Mach. Co. v. Ackoff, 245 F.2d 192 (3d Cir.), *cert. denied,* 355 U.S. 832 (1957), a trademark case in which the court said:

> Whether an award in civil contempt be measured in terms of a plaintiff's loss or a defendant's profit, such an award, by very

the courts to apply the patent damage statute to civil contempt proceedings indirectly benefits the contemnor. The increased damages provisions of section 284 for a deliberate infringement are punitive; and although the contemnor may lose his profits, he cannot be assessed punitive damages in a civil contempt proceeding.[73]

As the reader might suspect, determining what are "profits" of the contemnor is a troublesome issue. The authorities in civil contempt cases involving patent infringement injunctions are meager, and since "profits" clearly have not been recoverable in patent infringement suits since 1946,[74] the precedents which defined profits under the earlier damages statutes in patent infringement cases are outdated and difficult to reconcile. Obviously, the contemnor will urge that "net profits" only are recoverable,[75] but he has the burden of showing his costs and ex-

---

> definition, must be an attempt to compensate plaintiff for the amount he is out-of-pocket or for what defendant by his wrong may be said to have diverted from the plaintiff or gained at plaintiff's expense. *Unless this limitation is recognized, a requirement that one party turn his profits over to his adversary itself becomes a punitive rather than a compensatory imposition.*

Id. at 194 (emphasis added).

[73]*See* cases cited note 67 *supra*. *See also* Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447 (D. Conn. 1970), in which the court said that "to the extent that double or treble damages serve a punitive purpose, they may not be awarded in a civil contempt proceeding." *Id.* at 453. *But cf.* Dow Chemical Co. v. Chemical Cleaning, Inc., 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971), in which the court doubled the award of damages to complainant for loss of profits because of the knowing and willful violation by the contemnor of the injunction. However, the court did not rely upon the provisions of section 284 but doubled the damages because it was established that the violation of the injunction was knowing and willful. *Id.* at 1214. *See also* National Drying Mach. Co. v. Ackoff, 245 F.2d 192 (3d Cir.), *cert. denied*, 355 U.S. 832 (1957); United States v. United Mine Workers, 330 U.S. 258 (1947). In *National Drying*, the court indicated that "if the defendant deserved punishment for a willful wrong, the procedure must be that of criminal contempt rather than the employment of civil contempt as a punitive device." 245 F.2d at 195.

[74]Note 71 *supra*.

[75]*See* L.P. Larson, Jr., Co. v. William Wrigley, Jr., Co., 20 F.2d 830 (7th Cir. 1927), in which the court said:

> When the injured party seeks the profits of an infringer, he takes the chance of a reduction, or even extinguishment, though expenses and losses actually incurred, however unwisely or even improvidently, so long as they were incurred in good faith.

Id. at 832. *See also* Starr Piano Co. v. Auto Pneumatic Action Co., 12 F.2d 586 (7th Cir. 1926); Riverside Heights Orange Growers' Ass'n v. Stebler,

penses to arrive at a net profit figure.[76] There is some authority to the effect that in so doing, general overhead expenses may not be allocated between products sold in violation of the injunction and the nonviolative products.[77] On the other hand, there is authority to the effect that the contemnor's profit is not a proper measure of damages if the illegal sales resulted in a loss.[78]

As an additional element in determining the amount of a compensatory fine, complainant is entitled to recover his attorney's fees and costs and expenses incurred in conducting the civil contempt proceeding.[79] The patent statute with respect to attorney's fees in patent infringement cases is not applicable and thus the court is not limited to making an award of attorney's fees as a compensatory fine only in "exceptional cases."[80] The amount of the award for attorney's fees and costs and expenses appears to rest solely within the discretion of the court.[81] However, when complainant has taken steps to proceed against the contemnor in a criminal contempt proceeding as well as a civil proceeding, complainant is not entitled to receive an award for attorney's fees, costs and expenses in conducting the *criminal* proceeding

---

240 F. 703 (9th Cir. 1917); Standard Mailing Mach. Co. v. Postage Meter Co., 31 F.2d 459 (D. Mass. 1929); Merrell-Soule Co. v. Powdered Milk Co., 2 F.2d 107 (W.D.N.Y. 1924); National Folding Box & Paper Co. v. Dayton Paper-Novelty Co., 95 F. 991 (C.C.S.D. Ohio 1899).

[76]*See* National Rejectors v. A.B.T. Mfg. Corp., 188 F.2d 706 (7th Cir.), *cert. denied*, 342 U.S. 828 (1951); Horvath v. McCord Radiator & Mfg. Co., 100 F.2d 326 (6th Cir. 1938), *cert. denied*, 308 U.S. 581 (1939); Van Kannel Revolving Door Co. v. Uhrich, 297 F. 363 (8th Cir. 1924); Georgia Pac. Corp. v. United States Plywood Corp., 243 F. Supp. 500 (S.D.N.Y. 1965).

[77]Electric Pipe Line v. Fluid Sys., Inc., 250 F.2d 697 (2d Cir. 1957); Levin Bros. v. Davis Mfg. Co., 72 F.2d 163 (8th Cir. 1934). *But cf.* Riverside Heights Orange Growers' Ass'n v. Stebler, 240 F. 703 (9th Cir. 1917); Merrel-Soule Co. v. Powdered Milk Co., 2 F.2d 107 (W.D.N.Y. 1924).

[78]*See* Chesapeake & O. Ry. v. Kaltenbach, 124 F.2d 375 (4th Cir. 1941); L.P. Larson, Jr., Co. v. William Wrigley, Jr., Co., 20 F.2d 830 (7th Cir. 1927).

[79]Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); Siebring v. Hansen, 346 F.2d 474 (8th Cir.), *cert. denied*, 382 U.S. 943 (1965); Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447 (D. Conn. 1970); Town v. Willis, 89 F. Supp. 437 (W.D. Mo. 1950).

[80]Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447 (D. Conn. 1970).

[81]*See* cases cited note 79 *supra*.

even when complainant's attorneys were appointed special prosecutors by the court.[62]

With respect to imprisonment in a civil contempt proceeding, the contemnor can only be imprisoned to compel his obedience to a decree. Therefore, imprisonment for a fixed term is improper.[63]

V. Conclusion

The lack of reported cases in contempt proceedings instituted for violation of injunctions issued in patent cases may be explained either because the infringer finds a way to avoid further infringement and thus avoid violation of the decree, or because the patent owner and his counsel do not aggressively pursue their remedies under the federal contempt statutes. The cases in which the contempt powers have been used, however, are valid proof that such remedies can result in a monetary award greater than that recoverable in an ordinary patent infringement action. Moreover, the apparently seldom used criminal contempt power would seem to be an extremely effective deterrent which in the hands of private litigants may also further their own interests more than intended under the "purpose of punishment" test. Although the federal contempt statutes have withstood constitutional attack, a clarification of the statutes would appear desirable to remove the confusion and uncertainty that presently exists in regard to the nature of contempt proceedings in general. Particularly in the civil contempt area, there is a need for a clearer definition of the compensatory fine. When unsuspecting parties can be faced with criminal charges arising out of privately litigated disputes, Congress should set the guidelines regardless of traditional judicial views as to contempt powers, which views have resulted in a lack of certainty and much confusion. The public greatly needs and is entitled to better legislation from Congress in the contempt area if respect for the law is to be maintained.

---

[62]Backo v. Local 281, United Bhd. of Carpenters & Joiners, 438 F.2d 176 (2d Cir. 1970). *See also* note 30 *supra.*

[63]*See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1910); Parker v. United States, 153 F.2d 66 (1st Cir. 1946); Moskovitz, *supra* note 2, at 801-04.

THE AMERICAN CONTRACT SYSTEM: TODAY AND 2001

JUSTIN SWEET*

I. INTRODUCTION

The American contract system[1] has serious problems. "Freedom of contract"[2] rules in a world of standardized[3] forms and the absence of a viable system for handling adhesion transactions

---

*Professor of Law, University of California, Berkeley. B.A., University of Wisconsin, 1951; LL.B., University of Wisconsin, 1953.

[1]The contract system consists of these components: (1) *the sources of contract law*, which include constitutions, legislation, administrative regulations, appellate court decisions, and widely used standardized forms; (2) *the contract-making process*, which takes into account the contracting parties, the participants in the process (negotiator, technical advisors and lawyers), the degree of *actual* bargaining, and the bargaining duties created by the process (arm's length, good faith, fiduciary); (3) *the contract*, or the product of the process, ranging from one to many writings, varying in formality, completeness, comprehensibility, either individual or standardized; (4) *contract disputes resolution techniques*, including both public and private processes.

[2]"Contract," as used in this paper, is a set of legal rules under which the state delegates to the contracting parties the power to determine whether contracts will be made, how they will be made, and what they must contain. "Contract" is roughly equivalent to *party autonomy* (power given to the *parties* to make the rules), *private autonomy* (power given to *private* parties to make the rules), and *freedom of contract* (freedom of the parties to make the agreements they wish and in the way they wish). Contract contrasts with public controls, which, in varying ways, determine when contracts must be made, how they must be made, and what they must contain.

For some recent discussions of "freedom of contract," see Dewey, *Freedom of Contract: Is It Still Relevant?*, 31 OHIO ST. L.J. 724 (1970); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT. & COMP. L.Q. 172 (1965). Some of the many articles on adhesion contracts are set forth in note 3 *infra*.

[3]Adhesion contracts must be differentiated from contracts made in standardized forms. Adhesion contracts culminate transactions in which there is no meaningful bargaining over any or most of the contract terms. The terms are dictated by the dominant party. *See* Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). Standardized forms are created to take care of similar, if not identical, transactions so as to avoid repetitive bargaining or drafting of most or all of the terms. Contracts made on standardized forms are not necessarily adhesion contracts. The form may have been made by a trade association of buyers and sellers, or it may have been drafted after lengthy consultation with interest groups active in trade or industry affairs. *See*,

frustrate the expectations of at least one contracting party. The certainty[4] so basic to contract law is slowly vanishing. Uncertainty of results[5] and the high cost of making standardized forms produce

---

e.g., NEW YORK ASS'N OF COTTON TEXTILE MERCHANTS, COTTON TEXTILES SALES NOTE § 4 (2d rev. ed. 1941).

For a case in which a trade association form was considered neutral, see United Sales Co. v. Curtis Peanut Co., 302 S.W.2d 763 (Tex. Civ. App. 1957). Some forms do result from tough bargaining and are drafted with the skill found in well-drawn statutes. But generally, it is accurate to assume that most standardized forms are used in an adhesion setting.

For some recent discussions of adhesion contracts, see Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962); Shuckman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125 (1962); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Note, *The Adhesion Contract of Insurance*, 5 SANTA CLARA LAW. 60 (1964).

For discussions of Israeli treatment of adhesion agreements, see Comment, *Administrative Regulation of Adhesion Contracts in Israel*, 66 COLUM. L. REV. 1340 (1966); Note, *Restrictive Terms in a Standard Contract*, 7 ISRAEL L. REV. 433 (1972).

For a discussion of the English doctrine of fundamental breach, see Hickling, *One-Sided Contracts*, 108 SOL. J. 42 (1964); Leigh-Jones & Pickering, *Fundamental Breach: The Aftermath of Harbutt's "Plasticine"*, 87 L.Q. REV. 515 (1971); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964).

The Italian law is discussed in Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. L. 1 (1962).

[4]Certainty was emphasized in a recent United States Supreme Court decision, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972), in which the Court held a forum selection clause binding on the parties in the absence of any showing that enforcement would create undue hardship.

[5]The divergences of some recent cases have made it increasingly difficult for the prudent draftsman to place reliance on the enforceability of *any* contract provision. *Compare* Miller v. Lykes Bros. S.S. Co., 467 F.2d 464 (5th Cir. 1972) (provision on steamship passenger ticket barring suit for personal injury unless commenced within one year upheld), *with* Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11 (2d Cir. 1968) (similar provision held inadequate to bar suit), *and* Rehurek v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. App. 1972) (disclaimer of warranties clause on back page of contract failed for lack of conspicuousness). *Compare* Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971) (exculpatory clause in service station lease held unconscionable and unenforceable), *with* Lechmere Tire & Sales Co. v. Burwick, 277 N.E.2d 503 (Mass. 1972) (exculpatory clause in credit card application was to be strictly construed against drafter). *Compare* Bauer v. Jackson, 15 Cal. App. 3d 358, 93 Cal. Rptr. 43 (1971) (clause limiting carrier's liability held inadequate unless shipper given reasonable notice that greater protection available at higher shipping rates), *with* Gellert v. United

an inefficient contract-making system. Finally, in consumer transactions, the actual agreement often differs substantially from the contract.[6] This Article will explore these problems and attempt to predict how they will be dealt with in the next century. Part II will concern itself with the role lawyers play in the contract-making process. Part III will discuss the relationship between the broad autonomy given contracting parties and increasing legal controls on contracts. Part IV will appraise the present system from the vantage points of its major participants. Part V will predict how contracts will be made in the next century.

II. Lawyers and Contract Making

The high cost of legal services and the dominance of the adhesion contract have sharply reduced the participation of lawyers in the negotiation of contracts. Yet, lawyers still play a vital role in contract making. They continue to draft the important negotiated contracts, and they draft standardized agreements. While many factors contribute to the present chaotic and inefficient contract system, the education and training of lawyers assumes a crucial causal dimension. To ascertain the impact of lawyers, let us contrast contract making *without* lawyers with contract making with lawyers.[7]

A. Contract Making Without Lawyers

Let us construct two models: Model A, a transaction in which legal sanctions are unavailable or only remotely considered by the

---

Airlines, 474 F.2d 77 (10th Cir. 1973) (carrier may reasonably limit extent of liability by giving the shipper a reasonable choice to select the declared limit, with the compensation thereby being commensurate with the risk assumed).

[6]*See* Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 Duke L.J. 831. *See also* Agger, *Unconscionable Contracts under the Uniform Commercial Code*, 109 U. Pa. L. Rev. 401 (1961); Ellinghaus, *In Defense of Unconscionability*, 78 Yale L.J. 757 (1969); Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967); Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1 (1969).

[7]*Compare* Howell v. Coupland, 1 Q.B.D. 258, 259 (1876) (involving a blighted crop of potatoes), *with* United Sales Co. v. Curtis Peanut Co., 302 S.W.2d 763 (Tex. Civ. App. 1957) (involving a peanut crop failure caused by drought). In the first case the contract apparently was not drafted by an attorney and contained no clause dealing with disruptive events or unforeseen circumstances. The second involved a trade association form which had a *force majeure* clause. *See also* Warner Bros. Pictures, Inc. v. Bum-

parties,[6] and Model B, a transaction in which sanctions are available and it is quite likely that such sanctions will be sought in the event of nonperformance.

Even Model A agreements are likely to be expressed in tangible form. Objective expression of an agreement tends to induce performance. Contracting parties often feel a moral commitment to agreements they have made or may not wish to gain a reputation of going back upon their word. Ordinarily, such parties will perform as promised if they are shown objective proof that an agreement was made and proof of its terms.

Tangible expression serves another important function in a Model A transaction. Suppose, as is increasingly the case today, the contract maker is a large organization. Such an organization needs an efficient communication system. Centralized management must know the extent of commitments and entitlements. Production, distribution, sales, and finance components need similar information. The proper distribution of contractual information is central to any effective internal communication system. Satisfaction of this communication function can be accomplished by a tangible, transferable manifestation of the agreement which expresses the basic performances to be exchanged by the parties. For example, in a goods transaction the contract need only contain the description and quantity of the goods, the price, payment terms, and delivery schedules. In a service transaction all that would be needed would be a description of the services, the amount and terms of payment, and the date for performance.

Now let us move to a Model B transaction in which the participants are much more likely to invoke legal sanctions in the event of dispute. In this transaction, reduction of the agreement to tangible form serves the additional function of insuring that sanctions will be available. Suppose a Model B transaction occurred in a period of minimal state controls over contract, a period best typified by the nineteenth century. Clearly, a writing which contained a clear expression of the basic performances to be exchanged would be enforceable. Such an expression would satisfy the requirement that there be manifestations of mutual assent, and in

---

garner, 197 Cal. App. 2d 331, 17 Cal. Rptr. 171 (1961) (writers' strike held not to have prevented, materially hampered, or interrupted filmed television series within meaning of *force majeure* clause).

[6]*See* Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963).

most cases consideration requirements would be obviated.[9] Nor would a transaction without lawyers raise any "more formal agreement contemplated" problem. The Statute of Frauds would not prevent enforcement. Either the transaction would be one not required to be expressed by a memorandum or the memorandum would be clearly sufficient to satisfy the statute.[10] Such agreement, clearly expressing the performances to be exchanged, would suffice to ensure the availability of legal sanctions.

Realistically, in a transaction in which there are no lawyers, the contracting parties would not go through the preceding analysis. Their concern would be with tangible evidence of the agreement to furnish objective proof of the other party's commitment.[11] If proof of commitment is the objective, the contracting parties will be satisfied with any writing which will make it difficult for the other party to deny the commitment or the agreed terms. Clearly, this is adequately established by a tangible expression of the basic performances to be exchanged. As in a Model A transaction, the participants in a Model B transaction may also need internal communication, and this may be an additional reason to obtain a tangible manisfestation of the agreement. Under either Model A or Model B an expression of the performances to be exchanged would satisfy the reasons for expressing the deal in tangible form.

B. The Lawyer Enters The Process

In assessing the imprint lawyers make on American contracts, we must ask ourselves what clients expect of lawyers and how lawyers perceive their role.[12] Also, we must consider some aspects of legal education and the practice of law.

Certainly, lawyers and clients would agree that lawyers are expected to make the transaction "legal." Generally, contracting parties wish to have the choice of obtaining legal sanctions even if they say they will never seek them or that they consider their future usefulness quite remote. So, at a minimum, the lawyer is expected to insure that the agreement is legally enforceable, and

---

[9]The only possible obstacle to enforcement would be a finding that the promise was "illusory", *i.e.*, that the promisor did not obligate himself to do anything. 1 A. CORBIN, CONTRACTS § 145 (2d ed. 1964).

[10]*See* 2 *id.* §§ 498-501 (1950). *See also* UNIFORM COMMERCIAL CODE § 2-201 (1) [hereinafter cited as UCC].

[11]Such an objective is exemplified by lay aphorisms such as "It will be your word against his," or "Get it in writing."

[12]*See* Sweet, *The Lawyer's Role in Contract Drafting*, 43 CALIF. B.J. 362 (1968).

that it complies with the increasing number of legal controls on contracts. Also, most clients believe lawyers are more adept at expression than they; the lawyer is expected to bring clarity and completeness to the agreement. But more important, for our purposes, most lawyers see their roles as extending beyond simply making an agreement enforceable and using their skills with words. This extension is crucial in evaluating the effect lawyers have upon contract making and contracts.

Shattered transactions are an important part of a lawyer's professional life. As a result, lawyers do not share the optimism of their clients at the time contracts are made. The lawyer's experience causes him to focus upon the possibility of nonperformance while contracting parties and their negotiators think principally of performance. The lawyer anticipates the occurrence of events which can disrupt his client's planning and seriously affect his client's performance. To handle such risks, he will usually include a clause which relieves his client if designated events occur which would have a serious effect upon his client's performance.[13] Also, a lawyer is more likely than his client to consider the possibility of the other party's suffering serious losses if his client does not perform as promised. To reduce his client's exposure, in addition to clauses excusing nonperformance, the lawyer may seek to exculpate his client,[14] to limit his client's liability,[15] or, in a goods contract, to limit or exclude warranties.[16]

As for the lawyer representing a party who would suffer serious losses if the other party does not perform, his education and experience have taught him the difficulty of proving or collecting damages. As a result, he will consider and seek to insert clauses controlling the amount recoverable in the event of breach,[17] and he

---

[13] *See* cases discussed note 7 *supra*.

[14] *E.g.*, Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (hospital exculpation not upheld); Daniel O'Connell's Sons v. Commonwealth, 349 Mass. 642, 212 N.E.2d 219 (1965) (soil disclaimer clause upheld).

[15] *E.g.*, Leather's Best, Inc. v. The Mormaclynx, 451 F.2d 800 (2d Cir. 1971) (carrier's liability limited to $500 per container); *see* UCC § 2-719 (1)(a).

[16] *E.g.*, Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (disclaimer of warranties provision in seller's acknowledgment of buyer's order).

[17] *E.g.*, Walter E. Heller & Co., v. American Flyers Airline Corp., 459 F.2d 896 (2d Cir. 1972) (liquidated damages clause used to limit damages recoverable in event of breach).

will also use recitals to express the setting of the transaction to preclude any finding that his client's losses were not reasonably foreseeable.[18] As for the difficulty of collecting damages, this lawyer will focus upon methods of securing performance, such as requiring that a bond be obtained,[19] requiring that a solvent third party act as a guarantor,[20] creating a security interest in specific property,[21] or setting up a provision authorizing his client to withhold funds as security for damage claims.[22]

Also, the lawyer's legal education and experience are instrumental in his utilization of contract clauses to coerce performance, such as provisions for express conditions to payment,[23] provisions which, though disguised as liquidated damages or alternative performances, are, in effect, penalty clauses,[24] and provisions allowing termination.[25]

Some contracts will create rights that will be transferred or assigned. While the client may anticipate the need to provide for a clause permitting assignment, it is the lawyer who is more likely to anticipate the likelihood that the obligor may assert defenses and it is the lawyer who will think of a clause waiving such defenses against an assignee, creating negotiability by contract.[26] Also, it is

---

[18]Also, recitals are often used to prospectively establish liquidated damages. *E.g.*, Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir. 1965) (liquidated damages of $1000 per day for delay in construction of superhighway supported by recitals that delay would cause great inconvenience to the public).

[19]*E.g.*, Socony-Vacuum Oil Co. v. Continental Cas. Co., 219 F.2d 645 (2d Cir. 1955) (bond conditioned upon subcontractor's payment of all labor and material obligations under contract).

[20]*E.g.*, Walter E. Heller & Co. v. American Flyers Airline Corp., 459 F.2d 896 (2d Cir. 1972) (president-guarantor's termination of employment held not a failure of condition to liability of corporate debtor).

[21]*See* UCC § 9-107.

[22]*See, e.g.*, AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, Doc. No. A-201, § 9.5 (1970) [hereinafter cited as AIA Doc. No. A-201.]

[23]*See, e.g., id.* § 9.4.

[24]*See* Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84, 120-22 (1972).

[25]*E.g.*, Nu Dimensions Figure Salons v. Becerra, 340 N.Y.S.2d 268 (N.Y. City Mun. Ct. 1973) (provision forbidding cancellation held a penalty clause).

[26]*E.g.*, Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967) (contractual attempt to establish negotiability of promissory note given in conjunction with conditional sales agreement).

the lawyer who is more likely to anticipate a party's future desire to assign his contract rights or to delegate performance. Such anticipation will lead to the inclusion of a clause concerning assignment.

The lawyer knows that misunderstandings can occur, despite clear and complete contract language, and that he cannot anticipate all contingencies. His experience teaches him that contracting parties sometimes take dubious, if not dishonest, interpretation positions to avoid contract commitments. The virtual inevitability of disputes in some transactions and the strong likelihood of disputes in almost all transactions cause lawyers to consider dispute resolution. Also, legal education emphasizes dispute resolution processes. Consequently, a lawyer will seek to structure the contract, if he can, to control who will decide the dispute, where it will be decided, and what rules will be applied. To accomplish this he uses the contract to create an expert performance measurement process,[27] to displace litigation with arbitration,[28] to designate the forum court,[29] to designate the applicable law,[30] or to eliminate the jury.[31] The lawyer's education and experience have sensitized him to the risk of false claims and charges made by the other party as a means of avoiding a commitment. To give his client maximum protection, the lawyer, in his role as advocate, relies heavily on contract clauses to give his client advantages if litigation develops.

The extent to which the lawyer will deal with these matters in a contract depends upon the relationship between the contracting

---

[27]*E.g.*, AIA Doc. No. A-201, § 9.4.

[28]*E.g.*, J.S. & H. Constr. Co. v. Richmond County Hosp. Authority, 473 F.2d 212 (5th Cir. 1973) (further proceedings stayed when contract required submitting dispute to arbitration).

[29]*E.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). While the law has not always been clear on the enforceability of forum designation clauses, a recent case awarded the prevailing party attorneys' fees because the appellate attack on such a clause, in a negotiated contract, was held frivolous. Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972). *See* Copperweld Steel Co. v. Demag-Mannesman-Boehler, 354 F. Supp. 571 (W.D. Pa. 1973) (post-*Bremen* case discussing the reasonableness of a forum designation clause).

[30]*E.g.*, Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972) (upholding district court's dismissal of action when contract provided that courts of New York would be sole forum for resolving disputes).

[31]*E.g.*, David v. Manufacturers Hanover Trust Co., 59 Misc. 2d 248, 298 N.Y.S.2d 847 (N.Y. App. T. 1969) (upholding the validity of jury waiver provision on bank account signature card).

parties and the likelihood that such problems may arise. If the lawyer anticipates problems, he will include contract provisions designed to protect his client. For example, if he anticipates the possibility that the other party will claim fraud or misrepresentation, the lawyer will incorporate a clause stating that there have been no representations or, if there have been any, that they have not been relied upon.[32] If the lawyer anticipates false assertions by the other party that his client's agents have made representations, he may negate the authority of any negotiating agent or incorporate a provision stating that any representations or promises made by an agent are not binding unless contained in the contract. If the lawyer anticipates that his client's agents will make an authorized commitment, he may include a clause stating that only specific persons have authority to make or modify the contract or accept substandard performance.[33] The lawyer, by reason of his education and experience, realizes that adjustments are likely to be made in contract relationships which span any appreciable period of time. If he anticipates the possibility of false modification claims or claims that his client has waived contract terms, he may seek to incorporate provisions specifying formal requirements for modification[34] and negating waivers.[35] If the lawyer can anticipate damage claims, claims of the delivery of nonconforming goods, or claims for time extensions, he may incorporate a clause setting up a notice condition[36] as a protection against false or delayed claims. If he feels that the statute of limitations in his jurisdiction is ex-

---

[32]*E.g.*, Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 157 N.E.2d 597 (1959) (when contract for purchase of lease contained an acknowledgement by purchaser that no representations had been made by seller as to normal rents and expenses generated by the property, purchaser had no right of action against seller for alleged false representations as to operating expenses and profits).

[33]*E.g.*, C.I.T. Corp. v. Jannet, 419 Pa. 435, 214 A.2d 620 (1965) (contract provision requiring written modification of contract terms upheld in the absence of clear proof of claimed waiver).

[34]*Id.* Closely related to formal requirements for modification is the almost universal construction contract provision requiring that all proposed changes in design and materials be submitted in writing. *See* AIA Doc. No. A-201, § 12.1.

[35]*See* note 33 *supra.*

[36]*E.g.*, AIA Doc. No. A-201, § 7.4. *See also* Sweet, *Extensions of Time and Conditions of Notice: California's Needless Restriction of Contractual Freedom*, 51 CALIF. L. REV. 720 (1963).

cessively long and promotes delayed claims, he may insert a provision shortening the period of limitations.[37]

The lawyer's inclusion of such protective clauses may be motivated by considerations other than those of shielding his client if problems develop. Lawyers often see themselves as procedural experts. But whether such clauses have been inserted to protect the client or to create efficient administration,[38] they take up a good portion of the contract and are provisions which would very likely not be included in a contract drafted by nonlawyers.

American contracts are excessively long. Doubtless, there are many reasons for this,[39] but at least some of the responsibility can be traced to legal education. The student is constantly told to express everything with utmost clarity. While clear expression is obviously desirable, the incessant law school emphasis on bad drafting as a prime cause of litigation often instills in students, and ultimately lawyers, the pathological desire to cover everything, including things which are unlikely ever to occur.[40] The intense competition of law school and professional practice also leaves its mark on contracts. The constant pressure to excel without, unfortunately, a sense of professional responsibility and an appre-

---

[37]*E.g.*, Miller v. Lykes Bros. S.S. Co., 467 F.2d 464 (5th Cir. 1972) (upholding contractual provision on passenger ticket requiring that all claims against carrier be commenced within one-year period of limitation).

[38]*See* Inman v. Clyde Hall Drilling Co., 369 P.2d 498 (Alas. 1962). The *Inman* case concerned a provision in an employment contract creating a thirty-day condition of notice requirement. The contract also provided that judicial proceedings could not be commenced until six months after the compensation claim was filed. While these provisions could be justified on grounds of administrative efficiency, in light of circumstances the provisions appear to be designed to give the employer an unconscionable advantage in compensation disputes.

[39]Other possible reasons are: (1) the court's requirement that "disfavored" clauses, such as conditions in insurance contracts, remedial clauses, and indemnification clauses, be drafted with extreme specificity, (2) the increasing number and specificity of public law controls, (3) substantive rules which, unless modified by contract, are unsatisfactory, such as doctrines of impossibility and frustration, and (4) elimination of uncertain factors in litigation, such as clauses designed to control disputes.

[40]Many cases selected for inclusion in contracts casebooks are followed by questions which ask how better drafting could have avoided the lawsuit. While litigation sometimes results from poor drafting, other factors often cause litigation, such as the desire to create a favorable case precedent, the absence of good will, or the breakdown of a once close or friendly relationship. Admittedly, imprecise drafting often forms the basis for a claim even in disputes caused by the additional factors enumerated.

ciation of the probable often causes harsh standardized terms. Undoubtedly, some clauses relied upon by lawyers are useful and worthwhile. It is certainly desirable to plan a transaction completely and express it clearly. However, the lengths to which lawyers will go to eliminate chance and to protect their client produces the unwieldly, often barbaric contracts we see today.

III. Contract and Control

Undoubtedly, adhesion recognition[41] tumbled contract from the Olympian heights it occupied in the nineteenth and early twentieth centuries. However, contract remains a durable[42] and useful legal doctrine. The key components of this doctrine should be analyzed in appraising the present and predicting the future of the contract system.

There are many possible reasons why contract dominated the nineteenth century and early twentieth century and only recently has been looked upon with disfavor. As for the nineteenth century, contract meshed well with a market economy dominated by laissez faire concepts.[43] A system with relatively few formal controls and easy enforceability of agreements promotes contract making and leads to more exchanges and economic activity. In addition, exchanges are encouraged if the parties believe that the deal

---

[41]Judicial sensitivity to inequality of bargaining power has had a profound impact on recent developments in the law of contracts. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972); Lechmere Tire & Sales Co. v. Burwick, 277 N.E.2d 503 (Mass. 1972).

[42]The judicial recognition of plea bargaining opens up a new field. *See* Santobello v. New York, 404 U.S. 257 (1971). For a discussion of a waiver of a jury trial and the privilege of self-incrimination in the context of plea bargaining, see Tiger, *The Supreme Court, 1965 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv. L. Rev. 1, 19-25 (1970).

Also, for better or worse, contract concepts are beginning to play a role in regulating the relationship of college student and university. Appelgate v. Dumke, 25 Cal. App. 3d 304, 101 Cal. Rptr. 645 (1972); Zumbrun v. University of So. Cal., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972).

[43]*See* Wilson, *supra* note 2, at 173. For a modern treatment of contract as a market supporting device, see Macaulay, *Justice Traynor and the Law of Contracts*, 13 Stan. L. Rev. 812, 813 (1961).

The parties are often better able to determine the value of the performances exchanged than is the state. The collective bargaining context is dicussed in Swerdlow, *Freedom of Contract in Labor Law*, 51 Texas L. Rev. 1, 29-48 (1972); Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. Pa. L. Rev. 467, 473 (1964).

made will receive judicial protection. Also, contract is generally more elastic and responsive to changing business needs when unconstrained by governmentally imposed controls. As for overreaching and unfair exchanges, the pastoral nineteenth century, uncluttered by mass produced forms and modern ideas of imperfect competition, assumed that such difficulties could be handled by competition.

Broad grants of autonomy to contract parties reduce state costs. The creation and policing of modern state controls is a costly process. According broad powers to contracting parties places most rule making costs on the participants. Also, dispute resolution costs are minimized when judicial intervention is generally limited to interpretation and enforcement of the express terms of the contract. Since the parties have made most of the rules, the judge is relieved from any obligation to alter or restructure their basic agreement. While he may have to interpret the rules and occasionally decide whether the rules as expressed in the written contract are the entire set of rules, his role is certainly easier than if he has to "make a contract for the parties." Giving the parties almost plenary rule making power also makes performance more likely. Those who freely participate and voluntarily commit themselves are more likely to perform without state coercion.[44]

Contract can serve another important and useful function. If it is given broad scope it can operate to correct and adjust other unsatisfactory legal rules. When the contract goes beyond expressing the performances to be exchanged, it will often seek to change existing legal rules of loss distribution and dispute resolution.[45] Also, when it seeks to control remedies, it can conflict with unjust enrichment and forfeiture avoidance doctrines.[46] While we may question its legitimacy in adhesion transactions to regulate responsibility for personal harm[47] or to control the dispute resolution process, contract is a legitimate device by which parties should be able to adjust loss distribution rules in certain contexts. For

---

[44]There is a political rationale for state coercion of promised performance in a negotiated contract context. Sanctions are imposed because of "the consent of the governed." Also, it is more democratic to allow the interested persons to make up the rules which govern their relationship.

[45]*See* cases cited notes 25-29 *supra.*

[46]*See* cases cited notes 22, 23 *supra. See also* Freedman v. Rector, 37 Cal. 2d 16, 230 P.2d 629 (1951) (holding purchaser was entitled to receive the amount of his down payment in excess of seller's damages following purchaser's breach.)

[47]Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

example, tort rules have been moving toward finding professional persons, such as soils engineers, liable to their clients and to third parties for losses caused by their conduct, whether negligent or not.[48] This may look unfair to the soils engineer because of the fee he charges for his services, the state of the art of determining subsurface characteristics, the high risk of loss if he is incorrect, and the lack of comprehensive liability coverage at a price he can afford. To him the only solution may be a contract clause limiting his liability to certain specified risks. The fact that it may not be legitimate for automobile manufacturers to minimize their liability to persons injured by their defective automobiles should not necessarily mean that a soils engineer should not be able to minimize his exposure by contract for certain losses to certain persons. As another example, it is often possible that construction losses can be chargeable to a number of participants in the construction process. As between those liable to the injured plaintiff, the rules relating to contribution and quasi-contract indemnity are confusing and often irrational.[49] Contracting parties should be able to distribute these losses through express indemnification even if the result is that one person can insulate himself from liability for conduct tort law considers below the legal standard.[50]

Furthermore, in civil proceedings one can seriously question not allowing attorney's fees to the prevailing party,[51] permitting an unconscionably long period of time in which to commence litigation, and denying a plaintiff any damages when he cannot sur-

---

[48]*Cf.* Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969). For a discussion of the rights of third parties, see W. PROSSER, TORTS § 107, at 708-09 (4th ed. 1971). For a discussion of the rights of clients, see J. SWEET, LEGAL ASPECTS OF ARCHITECTURE AND ENGINEERING 125-26 (1970). While the case law has not yet gone to the extent of holding engineers to a standard beyond the professional standard of care, there have been suggestions that architects should be held "strictly" liable. Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967). A recent soils case would lend support to that position. *Cf.* Avner v. Longridge Estates, 272 Cal. App. 2d 695, 77 Cal. Rptr. 633 (1969).

[49]For a few of the many difficult indemnity cases, see MacDonald & Kruse, Inc. v. San Jose Steel Co., 29 Cal. App. 3d 413, 105 Cal. Rptr. 725 (1972); Tatar v. Maxon Constr. Co., 31 Ill. App. 2d 352, 277 N.E.2d 715 (1972). *See also* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (articulating a comparative fault rule).

[50]*E.g.*, Buscaglia v. Owens-Corning Fiberglas, 68 N.J. Super. 508, 172 A.2d 703 (1961) (holding that owner was entitled to restitution from contractor, for claim settled with third person, when contractor assumed duty to owner to protect persons on premises from injury).

[51]*See* D. DOBBS, REMEDIES 194 (1973).

mount the often frustrating "certainty" requirements.[52] Arguably, contracting parties should be able to *agree* upon the recovery of attorney's fees,[53] the creation of a reasonable period of limitations,[54] and the allowance of an agreed measure of recovery for contract breach.[55]

It is yet unclear whether any of these justifications was the reason that contract emerged and continued as a powerful legal doctrine. But the modern criticism of contract that has surfaced with the recognition of the adhesion transaction ignores the undoubted advantages of contract. The twentieth century has witnessed the explosion of mass produced standardized forms with their potential for large scale abuse.[56] Also, as modern man began to go into the market place and discover the realities of the bargaining process, he became aware of contract's encroachment upon other legal doctrines and institutions. Observers and participants witnessed the development of aggressive, highly organized advertising and selling techniques.[57] Deceptive or false representation by salesmen has become routine in transactions involving certain services and products. Also, sales and advertising literature often makes assertions not included in the formal document.[58] As a result, the reasonable expectation of the consumer often varies from the formal contract. Some sellers use contract to shield themselves from unauthorized, but often tacitly encouraged, representation. Likewise, contract is used as a shield by purveyors of unscru-

---

[52]*See* 5 A. CORBIN, *supra* note 9, § 1020.

[53]*See* D. DOBBS, *supra* note 51, at 201-04.

[54]*See UCC* § 2-725.

[55]*See* Sweet, *supra* note 24, at 142-45.

[56]*See* articles cited notes 2, 3 *supra*.

[57]*See, e.g.*, Rehurek v. Chrysler Credit Corp., 262 So. 2d 452, 456 (Fla. App. 1972). Recently the Supreme Court of California affirmed an award of restitution to deceived customers in an action brought by the State Attorney General for violations of a state statute on deceptive advertising. People v. Superior Court, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973). Also, it has been recently held that national advertising can create apparent authority in a service station dealer, Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971), *noted in* 33 U. PITT. L. REV. 257 (1971).

[58]*See, e.g.*, Bauer v. Insurance Co. of North America, 351 F. Supp. 873 (E.D. Wis. 1972) (group insurance); Miller v. Dictaphone Corp., 334 F. Supp. 840 (D. Ore. 1972) (pension plan); *cf.* Zumbrun v. University of So. Cal., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972) (college catalogs); Standard Land Corp. v. Bogardus, 289 N.E.2d 803 (Ind. Ct. App. 1972) (subdivision promotional material).

pulous sales literature to avoid the creation of apparent legal obligations.

There were and are legitimate reasons for mass produced contracts. They are essential to a society which mass produces goods and uses mass methods of advertising and distribution. They are also essential for proper operation of large scale enterprises with their need for efficiency and risk control. But contract gave large scale contract makers immense power and many abused it. Recognition of abuse of power caused public controls to erupt from legislatures,[59] administrative agencies,[60] and courts at every governmental level.[61]

To look at the present and predict the future, an exploration of the range of controls available should be pursued. While they overlap, it is useful to divide legal controls into those which regulate the process of contract making and those which involve the content of contracts.[62]

As to process, a system could be initiated under which the state would enforce *all* agreements and promises however made. At the other extreme, only state-made contracts could be enforced or even permitted. Between these extremes, in order to receive state sanctions, the state could require that: (1) contracts be written or memorialized in a designated concrete form; (2) the contract be the result of good faith bargaining; (3) contract terms in the writing be brought to the attention of and explained to the weaker party; (4) the parties to a contract be represented in the forma-

---

[59]At the federal level, recent examples are the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), dealing with employment discrimination, and the Consumer Protection Act of 1968, 15 U.S.C. § 1601 *et. seq.* (1970). California has extensively regulated retail installment sales, CAL. CIV. CODE § 1801 *et. seq.* (West 1973); health studio contracts, *id.* § 1812.80 *et. seq.;* swimming pool construction, *id.* § 1725 *et. seq.;* and credit cards, *id.* § 1747 *et. seq.*

[60]At the federal level, see Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973) (truth-in-lending); FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972) (order of FPC); Thorpe v. Housing Authority, 393 U.S. 268 (1969); Zale Corp. v. FTC, 473 F.2d 1317 (5th Cir. 1973) (truth-in-lending); N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys., 473 F.2d 1210 (2d Cir. 1973) (truth-in-lending); Rehart v. Clark, 448 F.2d 170 (9th Cir. 1971) (Navy regulation used to interpret enlistment contract).

[61]*E.g.*, Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[62]This differentiation is used in Nu Dimensions Figure Salons v. Becerra, 340 N.Y.S.2d 268 (N.Y. City Mun. Ct. 1973).

tion stage by a lawyer or by a public official such as a notary; (5) the contract be approved by a state official empowered to regulate certain transactions.

The first alternative is, in essence, the traditional nineteenth century system with principal reliance on the Statute of Frauds. The second is largely formulated for use in specialized relationships.[63] The third is used increasingly and is what could be called the "notice" form of protection.[64] In order for the contract to be effective, there must be knowing consent to its terms. In theory, by clearly informing a party of what he is getting, the market will enable him to shop around for the best deal.[65] Competition, then, will insure that the exchange is reasonable. This is often the first step in public regulation of a contract. As we are beginning to see, this approach is often inadequate and only a stepping stone to more comprehensive regulation. The fourth is used rarely in this country[66] and the fifth only in a limited, but increasing, number of transactions.[67]

As for controls over contract content or substance, at one extreme, the state could dictate the entire contract. At the other, it could enforce any agreement the parties have made as long as the requirements of the process have been met. Even in the high water mark of contract, the nineteenth century, there were some controls over content.[68] Between these extremes the law could single out certain contract clauses and subject them to a standard of

---

[63]*See* L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 449-51 (3d ed. 1972).

[64]*See* Fuentes v. Shevin, 407 U.S. 67 (1972); cases cited note 5 *supra*.

[65]*See* N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys., 473 F.2d 1210 (2d Cir. 1973).

[66]In Texas, under certain limited circumstances, an agreement to arbitrate will not be enforceable unless the parties have obtained the advice of counsel and their signatures appear on the contract. TEX. REV. CIV. ANN. art. 224 (1973).

[67]For example, many transactions affecting energy sources require approval in whole or in part by the Federal Power Commission. *See* FPC v. Lousiana Power & Light Co., 406 U.S. 621 (1972); Monstanto Co. v. FPC, 463 F.2d 799 (D.C. Cir. 1972); Farmland Indus. Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972).

[68]For example, contracts for an illegal purpose, usurious contracts, and contracts without consideration would not be enforced. As to specific clauses, neither penalties nor unreasonable restraints would be enforced.

reasonableness or deny their enforcement.[69] Contracts particularly susceptible to abuse could be singled out for comprehensive controls.[70] Legislatures are increasingly prescribing much of the content of such contracts. Whenever such contracts are controlled, legislation usually states what is permissible and what is prohibited. However, legislation rarely dictates the terms of the contract.[71] Sanctions for noncompliance can vary from nonenforcement of the illegal portion,[72] denial of enforcement of the entire agreement,[73] limitation of remedies in an illegal agreement,[74] and, ultimately, imposition of penal sanctions for noncompliance.[75]

From this brief overview, it is apparent that our present system comprehends a blend of contract and control. Part IV will seek to more closely explore some facets of today's system and Part V will, hopefully, provide a glimpse into the status of contract making in the year 2001.

IV. The Present System Appraised: Emphasis Upon Standardized Forms

An appraisal of the present system of mass produced forms entails: first, looking at the system through the eyes of some of its participants; secondly, taking a look in depth at a typical case; and finally, making a few concluding observations.

A. Views Of Some Participants

1. The Lawyer Drafting a Form

Increased public controls have made drafting a nightmare. In order to do a competent job, the lawyer must check many potential

---

[69] *E.g.*, Kaye v. Orkin Exterminating Co., 472 F.2d 1213 (5th Cir. 1973) (employment contract placing unreasonable restraints on prospective reemployment held invalid); Insurance Center Inc. v. Hamilton, 218 Ga. 597, 129 S.E.2d 801 (1963) (clause restraining franchisee's future sale of business held invalid); Cockerill v. Wilson, 51 Ill. 2d 179, 281 N.E.2d 648 (1972) (contract limiting terminability of associational charter held unenforceable).

[70] *See* statutes cited note 60 *supra*.

[71] *See* High, *Consumer Regulation in Texas—A Rejoinder by an Economist*, 50 Texas L. Rev. 463, 470 (1972); Note, *Standard Form Contracts*, 16 Mod. L. Rev. 318, 337-342 (1953).

[72] See UCC § 2-302.

[73] *Id. Cf.* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

[74] *E.g.*, Anco Inv. Co. v. Spencer, 292 N.E.2d 726 (Ill. 1973) (seller allowed to recover cost of goods sold even though contract failed for lack of signature).

[75] *E.g.*, People v. Superior Court, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973) (civil penalties for misleading advertising).

sources of legal controls. In addition, he must worry about the lack of uniformity between states. He wonders how he can possibly comply with varying state laws when his client's products are marketed on an interstate basis. He longs for some sort of federal system or at least uniformity of state laws.

The lawyer also has other difficulties, especially if he is inexperienced in drafting the type of contract he has been asked to prepare. He would like a source of information that would reduce his drafting time by pinpointing problem areas and providing appropriate language. Also, he would like information on business custom and usage in varying types of commercial transactions, because parties who do not have a fixed idea on a point are willing to go along with what is "usually" done. The content of form books rarely keeps up with practice. The forms that exist are cumbersome and poorly drawn. If the lawyer is part of a large drafting organization, such as a corporate department of a large law firm, he may find contracts that have covered similar problems which can help him. However, even such organizations would find an informational system covering the points mentioned useful. Some conscientious draftsmen are concerned about their professional responsibilities as lawyers. They may worry about participating in drafting contracts which violate state rules or are unenforceable.

Yet to the lawyer, the biggest problem is the uncertainty of enforcement of some clauses and some contracts he drafts.[76] If the legal controls are specified legislatively, he can comply if he so chooses. However, many recent controls have come from court decisions using vague terms such as "unconscionable" or "contrary to public policy."[77] While many draftsmen do not worry about enforceability, either out of indifference or a belief that the problem can be deferred until difficulties arise, the conscientious lawyer does not know whether what he drafts will be enforced. Even if he is unaware of or is willing to disregard his professional responsibility, he may entertain doubts about participating in a system which permits the strong to coerce the weak into accepting clauses which violate common decency.

2. The Forms User

The party who has requested an attorney to prepare a standardized form realizes that, although mass produced forms are less

---

[76] *See* cases cited note 5 *supra.*

[77] *See* cases cited note 61 *supra.*

expensive than individual drafts, they do not come cheaply. Legal fees for drafting are high, especially if the form is, as is typical, drawn by a large law firm or by highly paid in-house counsel. In order to prepare for drafting a standardized form, the lawyer must spend a considerable amount of time gaining an understanding of the transaction, checking old forms, and finding the often applicable public controls. As a result, many drafts are often needed for a good standardized form. Also, the user is becoming increasingly aware of the more frequent need to revise such forms, both to respond to new controls and to stay "competitive." The perceptive user who looks at his legal costs will want answers to the "benefit" side of a cost-benefit analysis. Although effectiveness data on standardized forms is difficult to find, it might be helpful to consider one problem from a cost-benefit standpoint, the vexatious nonmatching forms transaction.[78]

Suppose the seller submits his form and refuses to assent to the buyer's, while the buyer will sign only his buyer-oriented form. Suppose the user (either buyer or seller) asks his attorney whether the forms are examined if a dispute arises. It is likely his attorney will inform him that the representatives of each side will attempt to adjust the dispute relying mainly on commercial practices, good will, and good faith without adverting to the "fine print." The attorney will probably inform the user that even if he, the attorney, were brought into the picture, he would seek to handle the matter with the attorney for the other party by the use of common sense and what he would call "common-law" rules. If the dispute ends in court, the attorney will inform the user that the transaction is likely to be governed by the terms upon which both forms have agreed and the balance will be controlled by the Uniform Commercial Code.[79] Suppose the form user asks his attorney to justify the continued use of forms when, in reality, they are not looked to and are not likely to govern the transaction if litigation develops. The attorney will respond that there is no harm in using the forms and in rare cases, especially in dealing with an inexperienced or dishonest businessman, they may be of some value. Most commercial users would not be impressed.

---

[78] *See* Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39 (E.D. Ill. 1970), in which the court described the problem as "the legal abyss created in contract formation by industry's perennial battle-of-the-forms." *Id.* at 41. *See also* Application of Doughboy Indus., Inc., 17 App. Div. 2d 216, 233 N.Y.S. 2d 488 (1962).

[79] *See* UCC § 2-207.

Suppose the form seeks to substantially reduce the user's risk exposure by the use of exculpation, liability limitation, disclaimer of warranties, and the like. Here there can be danger in using the form. If a clause seeks to control initial liability for harm to persons and there is inequality of bargaining position, it is not likely that the clause will be enforced. But here the cost factor is not limited to the unlikelihood of enforcement. Clauses of this type may be taken too seriously by nonlawyer employees of the form user. This can increase the cost of settlement procedures, incur ill will, and cause a large court award. Also, public exposure of their use can lead to more repressive public controls. A less scrupulous user might be persuaded that it is helpful to use such clauses since many matters never get to an attorney and, as a result, claims will be discouraged or avoided. However, sophisticated form users are becoming more aware of their responsibility to the public and are more likely to appreciate the danger of using these contract provisions.

Suppose the client asks about transactions which begin with advertising literature or brochures and culminate with a "formal" agreement. A lawyer who is asked whether the formal contract controls the "deal" will have to answer that the law is increasingly giving legal effect to the promotional and advertising literature.[80] Dispute-control clauses, such as selecting the forum court[81] or designating a shorter period of limitations,[82] will be enforced only if reasonable. While this may be better than the public law rules, reasonableness as a standard does *not* provide the certainty clients expect from contract.

A forms user who is given honest answers will conclude that many printed terms will be enforced only if they are reasonable and, in the case of an adhesion contract, brought to the attention of the weaker party and, even then, only if they do not offend public policy.[83] With this devastating assault on the once all powerful written document, the user will begin to wonder if it is worth the cost and the effort.

---

[80]*See* cases cited note 58 *supra.*

[81]*E.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972).

[82]General Elec. Co. v. Lexington Contracting Co., 292 N.E.2d 874 (Mass. 1973) (provision limiting time period for commencement of action for breach held valid). *See also* UCC § 2-725(1).

[83]*See* cases cited note 5 *supra.*

3. The Forms Receiver

How does the system look to the members of the public who must face mass produced forms daily? Most receivers of adhesion contracts would not understand them if they had the time and inclination to read them. The rare receiver who took the trouble to read it would almost never find himself dealing with a person authorized to change it. If he went to others who supply similar services or goods, he would face similar forms. The receiver knows that anything on the form is likely not to be in his best interest. Yet he will sign the form and hope for the best. If he is told that legislatures, administrative agencies, and courts are protecting him, he will be cynical. He doubts that the rules will be followed. If a consumer is articulate and willing to fight or retains a lawyer, he can prevail. But the form will continue to be used. As to the possibility of governmental sanction of the violators, the forms receiver will either assume a "fix" or that wrong-doers, shielded by their batteries of lawyers, will run circles around well-meaning enforcement officials. If the forms receiver is shown the laws that can protect him, he will reply that vindication of his legal rights will cost him more than what is at stake. If told that class actions will shape up unscrupulous businessmen, he will assume that the lawyers are likely to end up with all the money.[84]

In addition to a "what's the use" attitude toward the fine print, the average receiver of such forms will complain vociferously about the fraud and deception of businessmen and their salesmen. These receivers contend that promises and representations are often made, but are either not included in the agreement or, if included, not performed or honored by the other party.[85] If asked why he did not see that these promises and representations were incorporated into his contract, he will say either that he trusted the other party or that he knew it would be useless to ask that the form be changed. If the receiver seeks enforcement of these promises or representations, the form will be a serious obstacle. In such a setting the form is a weapon to protect the dishonest.

Finally, the receiver will complain that the form does not tell him where to go or whom to see if he does not get what was promised or is unable to obtain satisfaction from the seller. While the aggressive consumer may retain a lawyer if he can afford one or

---

[84]*Cf.* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *cert. granted*, 94 S.Ct. 235 (1973).

[85]*See, e.g.*, Nu Dimensions Figure Salons v. Becerra, 340 N.Y.S.2d 268 (N.Y. City Mun. Ct. 1973).

see a public official, many will do nothing because they do not know where to go.

4. The Judge

How does the present system look to a judge called upon to deal with forms? A strong contract doctrine is attractive. It is easier for the judge to enforce the contract before him than to "make a contract for the parties" or decide which clauses are unconscionable or offend public policy. But the conscientious judge recognizes that the adhesion transaction has changed, if not obliterated, the underlying assumption of contract, that the agreement was arrived at through arm's length bargaining. Such a judge was probably never happy when asked to enforce harsh clauses that he believed were improperly obtained. As a result, reluctant as he may be to intercede, a judge probably welcomes increased public controls. But mushrooming public controls make the judge's research task more difficult. While it is burdensome enough to merely collect all the legislative controls, many of the statutes require that he determine what is reasonable, unconscionable, or against public policy.[86] He may not receive much help from the attorneys on these matters, and the rules of evidence are often restrictive. Furthermore, the judge also realizes that increased public controls mean longer contracts with an increasing likelihood of inconsistent language. The judge may often welcome the power that adhesion recognition has given him, but he is likely to desire greater assistance from the legislature and the bar in exercising that power.

5. The Legislator

The perceptive legislator, while acknowledging the need for controls, is beginning to recognize the limitations of legislation. Political pressure upon the legislative process often results in meaningless compromise, such as the enactment of largely inadequate "notice" controls. Also, the legislator wonders whether even sensible reform, which is not easy to create, will have any effect on the problem without extensive and costly policing. He recognizes that the frequent legislative compromise—good reform on paper with no funds appropriated to insure compliance—often disad-

---

[86] *Compare* Lechmere Tire & Sales Co. v. Burwick, 277 N.E.2d 503 (Mass. 1972) (adhesion contract construed against drafter), *with* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (adhesion contract held unenforceable).

vantages honest businessmen. Moreover, he may possess misgivings as to the efficacy of control as a device to limit competition.

Our perceptive forms legislator recognizes that the feeling of accomplishment which accompanies passage of consumer forms legislation can create a substantial danger. The danger is that one will ignore more basic causes of inequities in contract making and unfair contractual risk distribution. Finally, the legislator is asked to deal with many pressing social problems. Does control over contract forms take priority over crime, public welfare, taxation, and environmental problems?

B. A Typical Forms Case

Weaver v. American Oil Co.[87] exemplifies a typical forms case. In 1956, Howard Weaver, a forty year-old filling station employee with one and one-half years of high school education, learned that American Oil Company had a filling station available for lease. Weaver told Campbell, an agent for the oil company, that he had worked part-time in three filling stations and that he had sufficient funds to finance the inventory. Shortly thereafter, American Oil agreed to lease the station to Weaver. After the inventory was taken, "Campbell took a lease from his pocket, laid it on a table and said 'sign.' Weaver signed."[88] This was the only conversation relating to the lease. Evidently, Howard Weaver had not read the lease nor did Campbell call his attention to Clause 3, an exculpatory and "hold harmless" clause.[89] The lease was renewed each year

---

[87]276 N.E.2d 144 (Ind.), *aff'g on other grounds* 261 N.E.2d 99 (Ind. Ct. App. 1970), *noted in* 6 IND. L. REV. 108 (1972).

[88]261 N.E.2d at 101.

[89]Clause 3 read:

> Lessor, its agents and employees shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused to the person or property of anyone (including Lessee) on or off the premises, arising out of or resulting from Lessee's use, possession or operation thereof, or from defects in the premises whether apparent or hidden, or from the installation, existence, use, maintenance, condition, repair, alteration, removal or replacement of any equipment thereon, *whether due in whole or in part to negligent acts or omissions of Lessor, its agents or employees;* and Lessee for himself, his heirs, executors, administrators, successors and assigns, hereby agrees to indemnify and hold Lessor, its agents and employees, harmless from and against all claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees incurred by or imposed on the Lessor in connection therewith) for such loss, damage, injury or other casualty. Lessee also agrees to pay all reasonable expenses and attorneys' fees

until 1961 through the use of the initial 1956 assent procedure. In 1962 Homer Hoffer, an employee of American Oil, came to Weaver's station to repair some gasoline pumps. During Hoffer's postrepair demonstration, he sprayed gas over Weaver and his employee, Donald Miller. The gasoline ignited, burning both Weaver and Miller.

Each brought an action against Hoffer and American Oil for personal injuries. American Oil instituted an action for declaratory judgment and requested the trial court to determine whether the exculpatory and indemnification provisions of Clause 3 were binding. The trial judge received evidence of Weaver's educational and business background, the size and structure of American Oil, and the fact that American is a wholly-owned subsidiary of Standard Oil of Indiana. The judge also admitted evidence relating to the way in which the lease was presented to Weaver and signed by Weaver. The judge noted that Weaver's net yearly income from the operation of the filling station ranged from $5,000 to $6,000, and that the indemnification provision imposed upon Weaver "a potential liability far greater than, and completely out of proportion to, the benefit flowing to [Weaver] from . . . [the] lease agreement."[90] After listening to evidence of the respective size and experience of the parties and the risk entailed in the crucial clause, the trial judge concluded nevertheless that the clause was enforceable against Weaver.

The Indiana Court of Appeals recognized the adhesive nature of the clause. But the court, in agreeing with the trial court on the indemnification provision, noted that liability insurance was available, generally used, and could adequately protect Weaver from risk of liability to third parties, including American. However, the court did have trouble with the exculpatory clause. The judge noted that public liability insurance would not protect Weaver from injuries to himself. The court of appeals then stated:

> Traditionally, a contract is thought to be the product of the free bargaining of parties who meet as approximate bargaining equals. In this context, courts are extremely reluctant to declare contracts void as against public policy, because if there is one thing which, more than an-

---

incurred by Lessor in the event that Lessee shall default under the provisions of this paragraph.

276 N.E.2d at 145 (emphasis added).

[90] *Id.* at 152.

> other, public policy requires, it is that *men of full age and competent understanding* shall have the utmost liberty of contracting, and that their contracts *when entered into freely and voluntarily* shall be held sacred and shall be enforced by courts of justice. . . .
>
> Unlimited and unchecked "freedom" of contract, however, treats modern industrial and commercial problems as if they were a matter of two neighbors bargaining over the price of a horse in the 19th Century—a desirable and Utopian approach, but often unrealistic in terms of 1970 commerce.[91]

How should the court have dealt with this adhesion contract? While other solutions were available, it held that the validity of an adhesion contract must be dependent upon the weaker party's possession of full knowledge of the contract terms, and erected a rebuttable presumption that sufficient comprehension could not be present in an adhesion transaction.[92] Since there was no showing that Weaver was aware "of the clause or of its implications," the court concluded that the exculpatory provision was not enforceable.

A petition to transfer to the Indiana Supreme Court was granted. The supreme court, over a strong dissent,[93] refused to enforce either the exculpatory or the indemnification aspects of Clause 3.[94] The supreme court concluded that it was inconsistent to enforce one part of Clause 3 without the other. Evidently, it was unconvinced by the court of appeals' argument that one risk was usually insurable while the other was not.

After sketching the usual adhesion contract background the court stated that "[t]he superior bargaining power of American Oil is patently obvious and the significance of Weaver's signature upon the legal document amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil."[95] The supreme court, while noting that section 2-302 of the Uniform Commercial Code relating to unconscionability was not applicable, stated that this was an "unconscionable contract."[96]

---

[91] 261 N.E.2d at 103.

[92] *Id.* at 104.

[93] 276 N.E.2d at 148 (Prentice, J., dissenting).

[94] *Id.* at 144.

[95] *Id.* at 146.

[96] *Id.*

The court opined that no sensible person would make such a contract unless he lacked mental capacity or was under extreme duress. Moreover, it was impressed with the disparity between the obligation Weaver assumed under Clause 3 and the $5,000 to $6,000 a year he earned working seven days a week at long hours. The court also noted that the clause was in fine print and contained no title heading. The *Weaver* court concluded:

> It seems a deplorable abuse of justice to hold a man of poor education, to a contract prepared by the attorneys of American Oil, for the benefit of American Oil which was presented to Weaver on a take it or leave it basis.
>
> . . . .
>
> The burden should be on the party submitting such "a package" in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein. . . . Only in this way can justice be served and the true meaning of contract preserved.[97]

To be enforceable, according to the court, clauses of the type included in the Weaver-American contract must be knowingly and willingly made.

The dissenting judge stated that adhesion contracts were limited to those transactions which were not subject to negotiation and concluded that this transaction did not satisfy the adhesion test. The dissenting judge recognized the economic disparity between Weaver and American and the former's limited educational and business background. But, amazingly, he found no indication "that the printed lease provisions were not subject to negotiation or that, with respect to this particular lease, Defendant was not in a bargaining position equal to that of American."[98] In addition, the dissenting judge concluded, with the now familiar litany of dissenting judges in such cases, that this was a matter for the legislature.

The reader should note that American is unlikely to redraft the clause because the language is *not* deficient. It was drafted about as completely as it could be drafted, although perhaps it could have been written in a more lucid and understandable fashion. The astute attorneys for American will probably conclude that the

---

[97] *Id.* at 147-48.

[98] *Id.* at 154.

Indiana Supreme Court merely invited them to use a better *notice* technique in safeguarding the validity of such clauses. One might easily envision a memorandum from the attorney for American to all personnel of American who negotiate such leases. This memorandum would instruct the agents who negotiate such leases to direct the attention of prospective lessees to Clause 3 and to explain to them the import of the clause, perhaps even suggesting that the lessee obtain insurance.[99] The memorandum might go further and suggest that the agents have lessees initial or sign opposite Clause 3 to show that the matter has been brought to the lessees' attention.

In any event, suppose American can comply with the notice requirement and force such clauses on prospective lessees. A more difficult question is whether the law should permit a contract to allocate risks in this context. Of course, if the prospective lessee were intelligent, educated, and knowledgeable in business matters, he could handle both the exculpation and indemnification aspects of this transaction. He could, as the Indiana Court of Appeals suggested, obtain public liability insurance to handle third party liability.[100] As for losses to himself, he could secure health, disability, or business interruption insurance. However, it is quite probable that if the lessee has the clause pointed out and explained to him, he will not bargain any differently than did the lessee in the *Weaver* case.

Suppose further that the lessee were to be injured and unable to recover from American or an insurance carrier. Probably Weaver would go on public welfare. Surely this is a legitimate matter of state interest, and the State can decide that Weaver (and the State) should not take this risk.

Suppose the Indiana Supreme Court were to hold Clause 3 void as against public policy either because of the adhesive nature of the transaction, or because enforcement might encourage American to be careless. Would American still insert Clause 3 in its leases?

Suppose American's attorney were asked by his client whether American should continue to use Clause 3 in its leases. Even if the attorney stated that it was not enforceable, suppose he were

---

[99]*See* Boryk v. Argentinas, 332 F. Supp. 405, 406-07 (S.D.N.Y. 1971) (lessor relied on memo advising prospective lessees of necessity for liability coverage).

[100]261 N.E.2d at 102.

asked whether there was any harm in using it. The attorney might state that he could see no harm in using the clause. If a claim were made, and if the claimant were represented by an attorney, the attorney might point out the unenforceability of such a clause. In that case, the clause would not be relied upon in negotiations or in litigation. But the attorney might reason that not all claimants are legally represented and, even if the claimant were legally represented, the claimant's attorney might not be aware of the unenforceability of the clause. In such a case the clause could be of some value to American. For that reason, the attorney might conclude that there is no harm and possibly some benefit in using the clause. The attorney might even convince himself that clause would not be used if a legitimate claim were made against American but only if a false claim were presented.

It is most unlikely that counsel for American would consider the legal ethics involved.[101] Should an attorney advise a client that such a clause be used or participate in the creation of a contract with such a clause? If the clause is used, the contract can frustrate loss distribution rules, exert unfair control over the litigation process, and destroy the reasonable expectations of the weaker contracting party. In this situation, the general ignorance and disinterest in legal ethics is compounded by the failure of the ethical canons to deal with this problem specifically.

What can we learn from Howard Weaver's troubles? First, and most obviously, courts are not sympathetic to exculpatory and indemnification clauses in an adhesion setting. Secondly, courts are paying considerable attention to the bargaining context and the way in which contracts are made. The Indiana Supreme Court did so, and it is not a court noted for radical departures from existing law. Thirdly, the "notice" technique of handling adhesion transactions is of doubtful value in this context.[102] American and other forms users will simply adjust their contract making techniques to ensure that unfair provisions are made conspicuous and apparent to prospective forms receivers. In addition,

---

[101]The American Bar Association's Code of Professional Responsibility fails to deal explicitly with the propriety of drafting such clauses. The Code states that the lawyer should refrain "from all illegal and morally reprehensible conduct." ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Ethical Consideration* 1-5 (1969). "Misconduct" is defined to include "fraud" and "conduct that is prejudicial to the administration of justice." *Id. Disciplinary Rule* 1-102. Arguably, "misconduct" could be interpreted to include the use of contract clauses which the lawyer knows to be unenforceable.

[102]A notice system presupposes some competition and the ability or desire to shop around. In many adhesion transactions this is not present.

even if clauses of this sort are unenforceable without regard to notice, such a rule may have a limited impact on contract making practices. If it is void as against public policy, there should be sanctions to insure that such clauses are not oppressively used. Finally, contract should not play *any* role in loss distribution in this context.[103] Such losses are too important to leave to an adhesion transaction.

C. *Some Observations on the Current System*

Clearly, contract can no longer be given its prior high and exalted status. It still serves a legitimate function, and it is often better left alone than saddled with meaningless or cumbersome state controls. But the awesome power it can create in today's world of mass produced forms is too susceptible to abuse. It has become clear that the usefulness of alternative controls, including their respective limitations, must be carefully scrutinized. Notice controls, as a rule, make little sense in today's market. We must control the contracts *most* subject to abuse and the clauses *most* likely to frustrate orderly administration of justice and loss distribution. When we do enact controls, they should be: (1) clearly expressed, (2) self-executing and not left to the party who is being controlled, (3) policed properly, and (4) reviewed periodically. In addition, we desperately need a recording system which can accurately memorialize and store the events relevant to the contract formation process. To sum up, the present system is occasionally oppressive and often inefficient.

V. The System In 2001

Assuming that (1) the present system has serious defects, (2) these defects will be considered serious enough to warrant drastic change, and (3) the technology described will be available, it is appropriate to consider how the system will function in the next century.

A. *Negotiated, Tailor-Made Contracts*

There will be a modest number of tailor-made, negotiated contracts. They will memorialize nonroutine transactions, either

---

[103] A look at auto accident risk distribution indicates that "no fault" is almost with us. Beyond the horizon we can see that national health insurance or some form of compulsory private health care insurance will replace much of tort law. Interestingly, "no fault" insurance will broaden the scope of contract law since most of the disputes will be centered around an insurance policy—the paradigm of adhesion contracts!

quite important or unimportant, in which each party has relatively equal bargaining power. If important, the stakes will justify having attorneys draft the agreement. The traditional Nineteenth Century notions of contract make sense in such agreements. Interpretation should be confined to honest effectuation of the probable or actual intention of the parties. Gap-filling through implication should only be used when necessary to clarify terms which the parties thought too obvious to require expression or to give effect to unexpressed intention. Only when disruptive and reasonably unforeseeable events arise should the dispute resolution process make a conscious allocation of risk.

According contract considerable, if not plenary, scope in such transactions will not eliminate formal rules. Rules comparable to the Statute of Frauds and integration aspects of the parol evidence rule will continue to exist. However, rules of form will be altered to accommodate the different methods of recording information and formalizing agreements which will be common in the next century. For example video tape may be used to record the actual formalizing of a negotiated contract.[104] While such contracts dealing with important transactions will generally contain the entire agreement, problems could develop over asserted oral agreements made at the time the contract is signed. A better system of recording the events leading up to or at the time of making the formal agreement will assist the adjudication of such disputes. The less important individualized transaction would also profit from a system of recording events or contracts. Often, such contracts may not be complete and the use of technology to record and store events could provide an accurate memorial that would aid in dispute resolution.

There will be other forms of state control even in negotiated transactions. The state will allow only minimal tampering with public law rules relating to dispute resolution. The law of contract has gone too far in this direction and its power in this field will be sharply curtailed or eliminated. Only if the public rules are unclear, will reasonable, bargained provisions be given effect.[105]

In addition, in the next century there will be less need for contracting parties to deal with rules for dispute resolution. Juries

---

[104]*See* Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Col. 1972) (tape recording satisfied Statute of Frauds).

[105]*E.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). *See* Comment, *Enforceability of "Choice of Forum" Clauses*, 8 CALIF. L. REV. 324 (1972).

will very likely be eliminated in resolving commercial disputes and used only as expert fact finders. As a result of this and for other reasons, the dispute resolution process will be more accepted and trusted, making clauses relating to rules of evidence, burden of proof, remedies, and other clauses designed to compensate for deficiency in or distrust of the administration of justice unnecessary. Also, greater confidence in the public dispute resolution system should persuade lawyers of the twenty-first century that they need not cover every possibility nor anticipate every possible event. This may be expecting the millenium, but even today lawyer-draftsmen are beginning to realize that they cannot cover nor anticipate everything and that they must have confidence in the dispute resolution system.

Some negotiated contracts are of great importance to the state and will require another form of public control. Even today, some negotiated transactions must, realistically, be approved by public officials.[106] In the next century there will be more negotiated contracts which will require approval by public authorities. For example, contracts between space user associations and space suppliers will require approval by public authorities if they affect a sufficient number of users. Similarly, negotiated contracts such as group insurance plans that affect a sufficiently large number of persons will likewise require public approval. When approval is required, the twenty-first century will develop efficient methods of reviewing important negotiated contracts. The contract will be transmitted to the approving authorities through computers which will scan the contract, determine whether it is consistent with public rules, and single out questionable contracts and clauses for closer scrutiny. A principal disadvantage of present approval controls is delay. Technology will facilitate rapid approval controls. Such an approval system will be designed to protect the confidentiality of the arrangements made, provide a system for recording and storing such contracts, and assist public policy-makers in making resource allocation decisions.

There will be tailor-made, negotiated contracts which are not important enough to require approval. While marketing methods in the next century may virtually eliminate less important negotiated transactions, contract is a durable concept. Less important negotiated contracts will be filed for information, planning, and recordation purposes even though they need not be approved.

---

[106] *See* note 67 *supra*.

The contemporary contract making system lacks a storage and retrieval technique which can assist those who draft negotiated contracts. Lawyers need a better check list system, data on what are customary ways of handling certain commercial problems, and specimens of drafting language. Negotiated contracts of the kind described, filed in an efficient storage and retrieval system, will provide valuable, nonconfidential information to contract makers.

B. Mass Produced Contracts

Prediction of future developments in the realm of form contracts necessitates a brief consideration of certain features of the present system. There are some transactions in which weaker parties cannot bargain on anything, such as consumers dealing with public utilities. But there are many transactions in which the *basic exchange terms* are, to a greater or lesser degree, specifically "agreed to."[107] One party often "accepts" the other party's standard form for various reasons, such as an inability to bargain, an unwillingness to bargain, lack of time to bargain, no one with whom to bargain, a feeling that it is useless to bargain, similarity of standardized terms used by all competitors, or trust in the other party and his form. The usual standard form, in addition to specifying the performance exchange, deals with administration, nonperformance, remedies, and disputes. Mass produced forms are used because they spread the cost of contract making over many transactions, save bargaining time, and control risk uniformly. Also, they are expected to obtain maximum protection for the forms user, as in a mortgage transaction, or to reduce liability for the user, as in a seller's sale of goods form.

Some of the current justifications for certain standardized provisions will not exist in the next century. Uniformity of law relating to contracts, improvement of rules for dispute resolution, elimination of contract as an instrument for controlling initial risk distribution, a greater sense of moral obligation on the part of lawyers who draft mass produced contracts—these factors *and* assertion of public law rules relegating contract to its proper domain will mean that contracts will concentrate on the basic exchange. Those who provide essential or commonly used consumer commodities or services[108] will be considered public utilities. At a

---

[107]*See* Slawson, *supra* note 3.

[108]The modern conception of "necessaries" is expanding to cover such items. *See In re* Weaver, 339 F. Supp. 961 (D. Conn. 1972) (color television exempt); Rehurek v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. App. 1972) (automobile).

minimum, the state will dictate what we today consider the "boiler plate" or the standardized items. An increasing number of commodities and services will be, at least intermittently, totally regulated by rationing and price controls. But there will be a large residue of bargaining permitted on basic terms, especially in transactions involving commonly used consumer goods and services as well as living space beyond basic minimum needs. The consumer will select from different types of goods or services for which the pricing authorities or, if the price is not controlled, the market will set a range of prices. However, once the price is determined, the other terms will be determined by public authorities.

Other types of commodities and services not important enough to justify complete standardization of terms will be subjected to some controls. For example, a limited form of public control upon real estate broker agreements may be necessary because such agreements generate an unusual amount of misunderstanding, litigation, and, occasionally, oppression. For that reason, it will be necessary for rules to be developed which will provide a fair risk allocation, avoid misunderstanding and let the parties know where they stand. This type of control will be illustrated in the following examples.

To sum up, negotiated contracts will have minimal legal controls as long as they do not affect public interest. Mass produced contracts, involving essential or commonly used consumer commodities and services, will be dictated by public authorities, either totally or to the extent of major standardization of key terms. Other mass produced contracts not falling into that category will have legal controls designed to eliminate the worst aspects of oppression and render the contract making system more efficient.

C. Some Illustrations

1. Negotiated Contracts

Negotiated, tailor-made contracts will be divided into important contracts affected with a public interest and those which are not important enough to require close governmental control. As an illustration of the former, suppose a manufacturer makes a twenty-year contract with a natural gas supplier under which the latter will supply the former with natural gas. Future regulatory agencies will totally control production and use of energy resources. Such a contract in the next century will require prior approval by the regulatory agency. To avoid delay such contracts will be fed into a computer for transmission to a master computer located at the regulatory agency. The receiving computer will be programmed to determine whether the contract meets the standards set by the

regulatory agency. If so, notification of approval will be transmitted in a matter of minutes.

If the computer determines that the contract does not meet agency standards, the computer will report this back to the contracting parties and indicate the changes required for compliance with agency regulations. If these changes are acceptable to the contracting parties, the changes will be fed into the computer and the contract approved. If the proposed changes are not acceptable to the contracting parties, the reasons given by the contracting parties will be fed into the computer for evaluation. In most situations, an agreement will ultimately be reached by computer. In rare cases in which this cannot be accomplished, a television conference will be held, or, if needed, a hearing scheduled to resolve the differences. Submission of the agreement will provide data to the regulatory agency which will be vital in making policy decisions. Such a storage system will protect the confidentiality of information contained in the approved contract.

Many provisions that are found in contracts today will not have to be included or will not be allowed in contracts of the future. As a result, contracts will deal principally with the basic performance to be exchanged, excuses for nonperformance, and contract administration.

As a further example, consider the negotiation of group insurance agreements in the next century. Group insurance is currently generating problems because of conflicting documents, *i.e.*, sales literature, individual policies, and master agreements.[109] Such policies will have to receive governmental approval, just as those which deal with energy resources described earlier, even though the master policy may have been negotiated between a large employer or a strong association and the insurance company. Such group policies affect too many people to be left to the determination of the contracting parties. Such agreements will not have their terms dictated by the state, but they will be approved by the state in the same manner as energy purchase contracts.

Consider also the evolution of the long term commercial lease in the year 2001. Subject to time and place variations, contracts for the lease of commercial space do not involve substantial public interest considerations. Frequently, such a transaction will be formalized by a mass produced contract. For example, contracts for

---

[109] *See* Bauer v. Insurance Co. of North America, 351 F. Supp. 873 (E.D. Wis. 1972) (failure to notify defense rejected when insurer failed to bring notice period provision to insured's attention).

the use of office space in which the supplier and user have relatively equal bargaining power and utilize a tailor-made commercial lease will not usually require public approval. However, the agreement will be filed, its contents stored on computer tape, and it will be fed to regional agencies empowered to collect this information for planning and informational purposes. In a period of space scarcity, greater public control might be needed. In such a case, an approval system would be installed.

2. *Mass Produced Contracts*

First, let us look at contracts for commodities or services *not* essential to life or commonly used by consumers. Assuming that real estate brokers in the next century perform a role similar to today's broker, and that private property still exists, suppose a property owner wishes to hire a broker to find a buyer for his property. Let us look a bit more closely at today's system in order to predict how awareness of today's problems and the availability of technology can rationalize the transaction. Generally, brokers today use a mass produced form. Ordinarily such forms are drafted by broker associations or by lawyers retained by high volume brokers. As a rule, the property owner does not retain a lawyer to review the broker-oriented form. Broker-owner disputes are common and often result in litigation.[110] Brokers use contracts to deal with revocation by the owner, owner sales of the listed property, and the owner's sale of the property after the listing has expired to a buyer introduced to the owner by the broker. The owner may not wish to pay the broker if the broker finds him a buyer and the deal is never consummated due to default by the prospective purchaser.[111] Owners may also resist payment of the commission when the broker makes a quick sale. Also, owners become unhappy when the broker decides to concentrate his efforts on more attractive listings. In any event, the broker transaction is one in which, due to the frequent absence of good will bargaining, the broker looks largely to contract (his own and the contract for the sale of the property) as a means of protecting himself.

How will broker transactions be handled in the next century? Suppose the owner and the broker agree on the owner's selling price

---

[110] *See* 1 A. CORBIN, *supra* note 9, § 50.

[111] *E.g.*, Bernard Klibanow & Co. v. Shafer, 21 Ill. App. 2d 392, 276 N.E.2d 446 (1971) (real estate broker held entitled to commission notwithstanding nonenforceability of purchase agreement).

and the amount of commission, as well as the duration of the broker agreement. Broker and owner will go to a convenient computer center. They will feed into the computer the basic elements of their deal. The computer will ask questions of each party to apprise them of the possible pitfalls. The computers will also inquire whether any representations have been made in the areas which have proved troublesome in prior similar transactions.

If all the matters are resolved, the computer will print out the contract containing the basic exchange elements and including specialized provisions designed to control foreseeable points of controversy. The computer will also print out the name of an official with whom a dissatisfied party can consult. That official will be given authority to resolve disputes informally between the parties, subject to an appeal to an informal tribunal. This tribunal will consist of representatives of the public, homeowners, and brokers. In essence, there will be industry arbitration.

The computer will be able to print out terms for varying types of deals. For example, the parties could make a transaction under which the broker could receive maximum protection—something on the order of broker contracts today—but he would receive a lower commission. At the other extreme, the computer could print out a contract under which the broker assumed considerable risks in exchange for a higher commission. As an illustration of the latter, the broker could receive a higher commission only if the deal went through. The number of variations could not be infinite, but there would have to be sufficient flexibility for a workable system. The state's interest in such a transaction will not be sufficient to require that a government agency program the computer. Instead, the state will appoint a committee composed of private citizens representing different interests to ensure a broad spectrum of public inputs into the programming process.[112] Alternatively, local persons desiring to improve the system might set up such a program themselves, with or without state financial support.

Such a system could also use video tape techniques to make a record of the person who appears before the computer for identification purposes and also to provide a record of what transpired before the computer. In essence, such a system would be a high technology version of the best aspects of the European notary system.

Another transaction which will have to be rationalized is goods distribution. Today, the process is in a state of chaos. Buyers and

---

[112] *See* Note, *Standard Form Contracts*, 16 MOD. L. REV. 318 (1953).

sellers refuse to sign any form other than the ones prepared by their own lawyers. Such forms typically are one sided. The buyer attempts maximum protection while the seller tends to limit his exposure to almost zero. Businessmen, at least at the outset, rarely look to the standard terms, and their lawyers only utilize them when all other avenues for settling the dispute vanish. Today's businessmen and their lawyers who recognize the irrationality and chaotic nature of the system sometimes draft industry-wide agreements or master agreements between buyer and seller designed to cover many similar transactions for a fixed period of time. However, such industry or master agreements are difficult and costly to formulate. The irrational nonmatching forms system is used because the alternatives do not look any better and old habits die slowly.

By the twenty-first century, businessmen and their lawyers will decide that it is not worth the effort to draft such forms. Goods ordering will be done through computers. The state will encourage, and perhaps compel, groups of buyers and sellers to negotiate and conclude standardized rules for such transactions. Again, many of the clauses presently used will not be necessary or perhaps may not be valid in the next century. But there will still be a need for rules to govern the relationship between the parties. And these rules are likely to go beyond the basic performance exchange to encompass orderly administration, remedies, and allocation of certain risks. These provisions will come out of a computer center when the buyer and seller feed into the computer the elements of their transaction. The computer will be programmed by representatives of buyers and sellers aided by public interest groups with a stake in commercial policies.

As to transactions involving essential or commonly used consumer commodities and services, suppose a twenty-first century consumer purchases an appliance like a television set. Here again, many of the provisions which appear on today's standardized mass produced contracts for consumer durables will not be necessary or permitted. Policy makers will be primarily concerned with the production of a document informing buyer and seller of their respective rights under the agreement and providing an equitable method of orchestrating the performances to be exchanged. The buyer will go to an appliance distribution center and choose the item he wishes to purchase. The price of the appliance will either be set by the seller (perhaps subject to some bargaining), or set by the state. Once item and price are determined, he will go to a small computer in the distribution center. The computer will ask questions designed to determine whether the buyer knows what he is getting and

what he is promising to do. Also, the computer will be programmed to print out warranties[113] and credit terms and inform the purchaser to whom he should bring his complaints. Public authorities will program such transactions. Video tape will record the computer interview. All of the data relating to the transactions will be fed into a data bank which will be used for economic planning purposes.

Life insurance, at least in our economy, is an essential consumer service. At present, the insurance policy is a long, unreadable document primarily designed to control the scope of the insurer's risk with the result that the insured rarely knows what he is buying with his premiums. It is the classic illustration of what is becoming common in mass produced contracts; the standardized form is only looked to after the problem arises.

Here compulsory contracts will be produced by the state. The person desiring to purchase a policy will go to a computer-equipped insurance procurement center to obtain information and acquire some basic understanding of the insurance agreements available. Just as in the real estate broker transaction, there will be need for flexibility with regard to such factors as coverage, exclusions, and premiums. However, those terms which are important to the insured will have to be brought to his attention. Obviously, he should know the basic risk protected against, but in addition, he should know what he should do if a loss occurs and the public official he should contact if his claim is not being properly processed. All these items will appear processed in his computer printout. To avoid communication problems and misunderstandings, a video tape of all conversations will be made and stored, in addition to the computer communication data.

Another essential consumer commodity is living space.[114] Today, the market determines whether the tenant will have any significant power over the amount of rent or the duration of the lease, let alone other terms. Even if he does have some bargaining position, he is not likely to alter the standardized form.

---

[113]Israel recently created, by administrative regulation, a mandatory television warranty clause. *See* Comment, *Standardized Terms of Guarantee for T.V. Sets*, 7 ISRAEL L. REV. 147-48 (1972).

[114]American legal thought has begun, in many respects, to classify housing as a public utility. *See* Robinson v. Diamond Housing Corp., 463 F.2d 853, 871 (D.C. Cir. 1972); Chicago Housing Authority v. Harris, 49 Ill. 2d 274, 275 N.E.2d 353 (1971); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1972).

In the next century, individual space users will have their leases made by computers either located at the office of a public or private space supplier or at a nearby computer center. Rent will, depending upon the economic situation and particular locality, be controlled by the state or governed by the market. The user and the supplier's agent will feed into the computer the items to which they have agreed and the computer will ask questions to ensure that both parties, principally the user, fully comprehend the basic terms of their bargain. After these are established, the computer will print out the basic deal and information relating to an informal dispute resolution process. Also, the computer will print out standardized terms of approved space use programmed by public, or, in the case of higher rentals, quasi-public agencies which will include representatives of users and suppliers. The transaction will be recorded on video tape and stored.

Where users form an association, an agreement will be made by the association and the space supplier which will be similar to our present collective bargaining labor agreements. The state will either require good faith bargaining or establish procedures for compulsory arbitration. Also, such an agreement will have to be submitted and reviewed by a public agency through a computer process similar to the system for approval of group insurance agreements previously described.

VI. Conclusion

At best, the current contract system is cumbersome and inefficient. At worst, it is oppressive and overreaching. While contract as a social and legal institution is durable and indispensable, institutional and social changes coupled with recognition of the deficiencies of the present system will generate drastic changes in the next century.

First, some things such as judicial administration and most loss distribution will be beyond the power of contract, except in truly bargain transactions. Secondly, contracts will be shorter and more comprehensible with emphasis upon communicating the basic exchange of performance. Only in negotiated contracts will contract be allowed to go further, and even here there will be limits. Thirdly, legal controls will be pervasive, but of varying types, from recording and approving contracts, to the dictation of minor or, in the case of some transactions, all the terms of the agreement. Finally, technology will develop techniques for recording events, promoting communication, developing transactional flexibility, operating public controls efficiently, and storing and retrieving data needed for social and economic planning.

COMMENT

SENTENCING PROVISIONS IN PROPOSALS FOR A NEW FEDERAL CRIMINAL CODE

NILE STANTON*

I. INTRODUCTION

Among the most important set of statutes any nation has are its penal laws,[1] and it should concern every citizen that America's set is now in the process of being substantially revised. In 1966, Congress created the National Commission on Reform of Federal Criminal Laws and gave it the duty to "make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice" and to "make recommendations for revision and recodification of the criminal laws. . . ."[2] On January 7, 1971, former Governor Edmund G. Brown of California, who served as the Commission's Chairman, transmitted the group's *Final Report*[3] to the President

---

*Executive Director, Indianapolis Lawyers Commission. B.S., Ball State University, 1965; M.A., Ball State University, 1969; J.D., Indiana University, 1973. The views expressed herein are the author's and should not be construed to be those of the Lawyers Commission.

[1]Professor Wechsler, who was instrumental in the development of the Model Penal Code, has emphasized that:

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal laws govern the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.

Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[2]Act of Nov. 8, 1966, 80 Stat. 1516.

[3]NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as BROWN REPORT]. The lineage of, and much

and Congress. The *Report* in turn precipitated the development of two massive proposals to codify the federal criminal law. The first proposal, S. 1,[4] was introduced by Senator John McClellan on January 4, 1973. The second bill, S. 1400,[5] was introduced by Senator Roman Hruska on March 27, 1973. The bills would give Title 18 of the United States Code a complete overhauling.[6]

It should be noted that the United States has never had a true federal criminal "code,"[7] although codifications have more utility than do mere "compilations" or "consolidations."[8] The Crime Act of 1790[9] was our first set of statutory[10] criminal laws, and subsequent additions and revisions to the criminal law were made in such a way that Title 18 has become "a haphazard hodgepodge of conflicting, contradictory, and imprecise laws piled in stopgap

---

of the impetus toward, the *Brown Report* can be traced to 1952, the year the American Law Institute began work on the Model Penal Code. *See Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 2, at 552 (1971).

[4]93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. S558 (daily ed. Jan. 12, 1973), in which Senator McClellan succinctly analyzed some of the major provisions of the 538-page bill.

[5]93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. S5777 (daily ed. Mar. 27, 1973), in which Senator Hruska detailed the background to the bill and discussed briefly some of its highlights. The Attorney General's commentary, *id.* at S5782, on S. 1400, elucidates the Nixon Administration's rationale for most major provisos. *See also* H.R. DOC. NO. 60, 93d Cong., 1st Sess. (1973).

[6]*See generally* Brown & Schwartz, *New Federal Criminal Code Is Submitted*, 56 A.B.A.J. 844 (1970), in which it is noted that the Brown Commission confined itself to reforming the substantive provisions of Title 18 rather than to covering the entire United States penal law.

[7]*See* 119 CONG. REC. S558 (daily ed. Jan. 12, 1973) (remarks of Senator McClellan); *Hearings*, *supra* note 3, pt. 1, at 11 (memorandum from Mr. Malcolm Hawk to Senator Roman Hruska).

[8]*See* McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663. *See also* Brown & Schwartz, *supra* note 6, at 845; *Hearings*, *supra* note 3, pt. 1, at 16-18 (testimony of Attorney General John Mitchell).

[9]Act of April 30, 1790, 1 Stat. 112.

[10]In 1812, the United States Supreme Court declared that there were no federal common law crimes. United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812). Writing for the Court, Justice Johnson maintained that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare that the court shall have jurisdiction of the offence." *Id.* at 34. *Accord*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

fashion one upon another with little relevance to each other or to the state of the criminal law as a whole."[11] S. 1 and S. 1400, the first comprehensive efforts to reform the federal criminal law since 1948,[12] represent monumental efforts to bring Title 18 into the twentieth century. The limited purpose of this Comment, however, is to analyze and compare only a few of the changes for which these bills provide—the proposals pertaining to sentencing. These proposals will be analyzed with particular reference to the American Bar Association's Minimum Standards for Criminal Justice[13] and the 1973 Working Papers of the National Advisory Commission on Criminal Justice Standards and Goals.[14]

II. The Classification of Crimes

Existing sentencing categories in the federal law are, as the Brown Commission emphasized in 1971, "chaotic and inconsistent."[15] The Commission concluded that there is no apparent rational basis for having approximately seventy sentencing categories: several categories provide widely disparate sentences for very similar offenses, while others allow comparable sentences for grossly diverse crimes. Accordingly, it was recommended that, for purposes of sentencing, six categories for all federal offenses be

---

[11] *Hearings*, *supra* note 3, pt. 1, at 102 (testimony of Representative Poff). For example, the scope of federal jurisdiction is unclear; the system of fines is in hopeless disarray; definitions of crimes are frequently inconsistent; similar offenses are widely scattered in Title 18; length of prison sentences are too infrequently related to the severity of the offenses; and antiquated offenses (such as detaining a United States carrier pigeon) are retained while loopholes for newer crimes still exist.

[12] *See* McClellan, *supra* note 8, at 677, 683 (succinctly discussing the so-called Penal Code of 1909 and the 1948 revisions).

[13] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968) [hereinafter cited as ABA Sentencing Standards]. For convenience, references to S. 1 and S. 1400 will occasionally be by section number only. References to S. 1 begin with a single digit and include a letter, for example "section 1-4B5." References to S. 1400 have four digits, for example "section 2301." References to sections developed by the Brown Commission will be prefaced with the letters "BC," for example "BC section 3202."

[14] Hereinafter cited as Peterson Commission Working Papers.

[15] Brown Report 272. *See* Alexander, *A Hopeful View of the Sentencing Process*, 3 Am. Crim. L.Q. 189 (1965). The former Director of Prisons opined that Title 18 is "so inconsistent in its penalty structure as to be almost incoherent." *Id.* at 190. *See also* Beckett, *Criminal Penalties in Oregon*, 40 Ore. L. Rev. 1, 71 (1960); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 56 (1966).

established.[16] The Brown Commission recommendation conforms to ABA Standards[17] and has been substantially incorporated into S. 1 and S. 1400.[18]

III. Length of Prison Terms

In spite of the fact that S. 1 and S. 1400 would drastically cut the categories of sentences, in the same breath both proposals call for terms of imprisonment far in excess of terms which have received the imprimatur of ABA Standards and the Peterson Commission recommendations. S. 1 authorizes, for a "Class A" felony, an upper-range term of thirty years and a lower-range term of twenty years and, for a "Class B" felony, an upper-range term of twenty years and a lower-range term of ten years.[19] On the other

---

[16] *See* BC § 3002.

[17] ABA Sentencing Standard 2.1(a):

> All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes for each jurisdiction should be revised where necessary to accomplish this result.

[18] *See* S. 1, § 1-4B1 & S. 1400, § 2301, cited in part notes 19 & 20 *infra*.

[19] S. 1, at § 1-4B1, provides, in part:

> (a) Authorized Upper-Range Terms for Felonies.—The authorized upper-range terms of imprisonment for felonies are:
>
> (1) for a Class A felony, a term of years not to exceed 30 years;
>
> (2) for a Class B felony, a term of years not to exceed 20 years;
>
> (3) for a Class C felony, a term of years not to exceed 10 years; or
>
> (4) for a Class D felony, a term of years not to exceed 6 years.
>
> (b) Authorized Lower-Range Terms for Felonies.—The authorized lower-range terms of imprisonment for felonies are:
>
> (1) for a Class A felony, a term of years not to exceed 20 years;
>
> (2) for a Class B felony, a term of years not to exceed 10 years;
>
> (3) for a Class C felony, a term of years not to exceed 5 years; or
>
> (4) for a Class D felony, a term of years not to exceed 3 years.

hand, S. 1400 would simply establish a maximum term of life imprisonment or any term of years for a "Class A" felony and would sanction a term of thirty years for a "Class B" felony.[20]

It must be stressed that the "upper-range terms" of section 1-4B1 are to be imposed only on the worst offenders. The Brown Commission indicated that "[s]uch long term sentences mainly perform an incapacitative function and should therefore be imposed only on defendants who are exceptionally dangerous."[21] And, as the United States Supreme Court held in *Jackson v. Indiana*,[22] the due process clause requires that both the "nature and *duration* of commitment bear some reasonable relation to the *purpose* for which the individual is committed."[23] Admittedly, the Court was specifically

---

(c) OTHER AUTHORIZED TERMS.—The authorized terms of imprisonment for other offenses are:

(1) for a Class E felony, a term not to exceed 1 year;

(2) for a misdemeanor, a term not to exceed 6 months; or

(3) for a violation, a term not to exceed 30 days.

[20]S. 1400, at § 2301, contains, in part, the following:

(a) IN GENERAL.—A person who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) AUTHORIZED TERMS.—The authorized maximum terms of imprisonment are, in addition to the automatic contingent term specified in section 2302:

(1) in the case of a Class A felony, life imprisonment or any term of years;

(2) in the case of a Class B felony, not more than thirty years;

(3) in the case of a Class C felony, not more than fifteen years;

(4) in the case of a Class D felony, not more than seven years;

(5) in the case of a Class E felony, not more than three years;

(6) in the case of a Class A misdemeanor, not more than one year;

(7) in the case of a Class B misdemeanor, not more than six months;

(8) in the case of a Class C misdemeanor, not more than thirty days;

(9) in the case of an infraction, not more than five days.

[21]BROWN REPORT 443.

[22]406 U.S. 715 (1972), *rev'g* 253 Ind. 487, 255 N.E.2d 515 (1970).

[23]406 U.S. at 738 (emphasis added).

alluding to commitments to mental institutions. There is, however, little reason to believe that due process should not also require a reasonable relation between the duration of confinement to the purpose for confinement in criminal cases as well since the crux of the right in both civil and criminal commitments centers about deprivation of liberty, not the label of the proceeding.[24]

The duration of confinement and the purpose for confinement must, at least with respect to the longest prison terms sanctioned,[25] bear some reasonable relationship under S. 1. The upper-range terms of section 1-4B1 are not to be imposed unless the convicted person is a "dangerous special offender" as determined pursuant to section 1-4B2.[26] However, section 2301 of S. 1400 contains no limitations or additional penalties vis-a-vis "dangerous" persons. Hence, S. 1400 would sanction much longer terms of imprisonment for every class of offense than would S. 1. For example, persons convicted of a "Class B" felony would normally be sentenced to a term not to exceed ten years under S. 1, but sentenced to a term of not more than thirty years under S. 1400.

---

[24]United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959).

> Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and essence of the proceeding rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply.

Id. at 902. *See* Jackson v. Indiana, 406 U.S. 715 (1972); *In re* Gault, 387 U.S. 1 (1967). *See also* Wilson v. State, 287 N.E.2d 875 (Ind. 1972).

[25]*See* note 19 *supra*.

[26]This section, which is similar to BC § 3202, provides in pertinent part that an offender is "dangerous" if a "period of confinement longer than that otherwise provided is required for the protection of the public." And section 1-4B2(b)(2) stipulates that he is a "special offender" if (1) he has been convicted of two felonies arising from occasions different from the current felony and from one another and has been imprisoned for at least one of these prior to the commission of the current felony, without regard to pardoned and invalid crimes, (2) he committed the current felony as a pattern of criminal conduct which constitutes a substantial source of his income or which manifested special skills or expertise, (3) his mental condition is abnormal and makes him a serious danger to others and the current felony was an instance of aggressive conduct done in heedless disregard for the consequences, (4) he used a firearm or destructive device in the crime or flight from it, or (5) the current felony was, or committed in furtherance of, a conspiracy with at least three other co-conspirators to engage in a pattern of criminal conduct in which he did, or agreed to, plan or supervise or give or receive a bribe or use of force for such conduct. *See generally* S. REP. No. 617, 91st Cong., 1st Sess. 83-100, 162-67 (1969).

The long prison terms provided by S. 1 and particularly those provided by S. 1400 are directly in conflict with ABA Standards and recommendations of the Peterson Commission, though S. 1 largely conforms to the Brown Commission's suggested terms. Specifically, the ABA Standards state that the maximum prison term normally authorized should be five years, rarely ten years, and twenty-five years or longer only under very exceptional circumstances.[27] In comments to the ABA Standards it is reasoned that sentences in excess of five years are impractical, under most circumstances, (a) since well over ninety per cent of prisoners are released from custody in less than five years (most being released in less than *two* years), and (b) since studies, such as the post-*Gideon v. Wainright*[28] one,[29] indicate that, in general, prisoners released early do not recidivate any more frequently than those

---

[27]ABA SENTENCING STANDARD 2.1(d).

[28]372 U.S. 335 (1963).

[29]*See generally* ABA SENTENCING STANDARD 2.1(f), Comment. *See also* Peterson Commission Working Papers at C-104, where the following chart is presented:

MEDIAN NUMBER OF MONTHS SERVED PRIOR TO FIRST RELEASE

	All State Prisoners (1964)	Mass. (1966)	Calif. (1971)	N.Y. (1970)	Ohio (1971)	Me. (1970)
Crimes against Property:						
Burglary	20.1	13.5	45.0* 27.0**	20.1	19.8	27.9
Forgery	17.1	14.5	23.0	20.4	17.5	
Auto Theft	17.9	14.5	24.0	21.6	27.6	22.0
Other Larceny	16.5	14.5	....	22.3	19.0	22.0
Crimes against the Person:						
Homicide	48.5	65.0	....	207.3 murder 31.8 homocide	46.2	***
Robbery (armed)	36.1	20.0	46.0	22.4	42.1	51.0
Unarmed robbery		15.0	37.0			43.9
Assault w/deadly weapon			39.0	23.6	32.5	32.5
Other	....	17.0	....	....	....	....

*1st degree burglary
**2d degree burglary
***2d degree murder—102.0
3d degree murder—144.0
1st degree manslaughter—64.5
2d degree manslaughter—49.0

kept to mandatory release dates. On similar rationale,[30] the Peterson Commission stated, "[T]he maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed 5 years for felonies other than murder."[31] The prison terms allowed by S. 1 and S. 1400 are unduly harsh and, on their face, can morally—though not legally—be viewed as cruel and unusual punishment.[32]

IV. Mandatory Minimum Prison Terms

While stipulating that mandatory minimum terms are not allowed unless set by affirmative action of the court, S. 1400 sets forth no guidelines which must be taken into account in imposing such terms.[33] On the other hand, S. 1 allows the imposition of mandatory minimum terms by affirmative court action only if the court takes into consideration features "such as those which warrant imposition of a term [in the upper-range under section 1-4B1(a)]."[34]

S. 1 and S. 1400, in requiring affirmative action for the imposition of minimum mandatory terms, are in this respect both improvements on existing law. At present, federal law makes a minimum term mandatory and automatic, absent court action to negate it. S. 1 provides that the mandatory minimum term can be set *if* the court makes a finding that this is necessary for specific reasons, but S. 1400 contains no such requirement—as indicated earlier. In this respect, S. 1400 flies in the face of the ABA Standards and the recommendations of the Brown Commission and the Peterson Commission.

The ABA Committee on Standards for Sentencing Alternatives and Procedures could not agree that judicially imposed minima

---

[30]The Commission's Operational Task Force for Corrections remarked:

> Lowering the authorized maximum term will not unduly restrict the court's discretion as it affects the length of time *actually served* in prisons. It will, however, reduce the excessively long sentences served by some offenders for whom such sentences are inappropriate. It will also diminish disparate treatment of similarly situated offenders.

Peterson Commission Working Papers at C-105.

[31]*Id.* at C-102.

[32]*See generally* K. Menninger, The Crime of Punishment (1969).

[33]*See* § 2301(c).

[34]§ 1-4B1(c). *See* note 26 *supra.*

should be sanctioned, although the Committee did agree that required minimal terms should not be set by legislatures—a view also shared by the two commissions. In its Comment to Standard 3.2(c), the ABA Committee indicated that a minority opposed any minimum terms. However, the majority opined that judicially imposed minima should be allowed because, "[i]rrational as it is," the climate of public opinion demands it, and sentencing courts are in the best position to ascertain when such sentences should be imposed. The Comment further indicates that the minimal terms should be imposed only if the dangerousness of the offender to the community, in the court's judgment, requires such a sentence.[35]

V. Appellate Review of Sentences

S. 1 and S. 1400 differ with respect to sentencing provisions in many ways in addition to the variances regarding the length of prison terms. S. 1, at section 3-11E3, allows for appellate review of sentences; but S. 1400 contains no such proviso. Here, S. 1400 is like current federal law: presently, all aspects of a criminal case *except* the sentence are subject to appellate review. However, S. 1400, in adhering to current law, has failed to conform to unanimous judgments expressed in the ABA Standards and the recommendations of the Brown Commission and the Peterson Commission.[36]

---

[35]ABA Sentencing Standard 3.2(c), Comment. *Accord,* Brown Report 285-86; Peterson Commission Working Papers at C-107 & C-110, which sanction mandatory minimum terms only after special findings of dangerousness.

[36]*See generally* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Approved Draft 1968). Standard 1.2 provides:

> The general objectives of sentence review are:
>
> (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
>
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
>
> (iv) to promote the development and application of criteria for sentencing which are both rational and just.

Standard 2.1 provides, in part: "In general, each court which is empowered to review the conviction should also be empowered to review the disposition following conviction. . . ."

The Indiana Constitution allows judicial review and revision of a sentence imposed in a criminal case.[37] In the federal system, however, a sentence may only be either reduced by the trial court within 120 days after it is imposed, if no appeal is taken, or corrected at any time if it is illegal or imposed in an illegal manner.[38] If a sentence is excessive or unjustifiably disparate when compared with sentences meted out for offenses of a similar nature, the sentence will nevertheless stand unreviewable unless the trial court exceeded its "sound discretion." But any sentence imposed in a lawful manner which is within the statutory limits meets the test.[39] It is incongruous that S. 1400 would continue

---

The Brown Commission proposed that 28 U.S.C. § 1291 (1970) be revised by adding the following language to the end of the section: "Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings." BROWN REPORT 317.

The Peterson Commission recommended the following:

> Procedures for implementing the review of sentences on appeal should contain the following precepts:
>
> 1. Appeal of a sentence should be a matter of right.
> 2. Appeal of a sentence of longer than 5 years under an extended-term provision should be automatic.
> 3. A statement of issues for which review is available should be made public. The issues should include:
>
> a. Whether the sentence imposed is consistent with statutory criteria.
>
> b. Whether the sentence is unjustifiably disparate in comparison with cases of similar nature.
>
> c. Whether the sentence is excessive or inappropriate.
>
> d. Whether the manner in which the sentence is imposed is consistent with statutory and constitutional requirements.

Peterson Commission Working Papers at C-120. *See also* Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?*, 41 A.B.A.J. 13 (1955).

[37]IND. CONST. art. 7, § 4: "The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed."

[38]FED. R. CRIM. P. 35. *See, e.g.*, United States v. Gorman, 431 F.2d 632 (5th Cir. 1970) (district court lacks jurisdiction to consider untimely motion to reduce sentence and court of appeals has no jurisdiction over appeal from denial of such a motion); Marshall v. United States, 431 F.2d 355 (7th Cir. 1970) (illegal sentence can be corrected at any time).

[39]*See, e.g.*, Gilinsky v. United States, 430 F.2d 1292 (9th Cir. 1970); Pependrea v. United States, 275 F.2d 325 (9th Cir. 1960); Granger v. United States, 275 F.2d 127 (5th Cir. 1960).

to make a sentence the sole feature of a criminal case which cannot be subjected to appellate review, particularly in view of the fact that the bill would sanction prison terms which are designed to be very harsh.

VI. Resentencing to Longer Terms

Section 1-4A2 of S. 1 provides that if the conviction of one or more, but not all, of the offenses for which a sentence is imposed is set aside on appeal or collateral attack, the case shall be remanded for resentencing. The section further allows the court to impose any sentence which it might originally have imposed for the offense as to which the offender's conviction has not been set aside. The effect of section 1-4A2 is to permit the possible imposition of a longer prison term upon resentencing. S. 1400 does not contain any similar proviso and, presumptively, would allow the same effect through *North Carolina v. Pearce*.[40] There the United States Supreme Court permitted the imposition of a higher sentence upon reconviction subsequent to the reversal of an original conviction.

The Brown Commission, taking the middle-ground of *Pearce*, adopted a position which allowed neither absolute court discretion to resentence to a higher term nor an absolute bar to such sentences. The Brown Commission would (1) allow a higher sentence only on the basis of conduct subsequent to the original conviction and (2) require the court to set forth reasons for the imposition of a more severe sentence.[41] However, a substantial minority of the Brown Commission[42] preferred the ABA position.

---

[40]395 U.S. 711 (1969). *Pearce* did, of course, require that time served under the first sentence must be subtracted from whatever new sentence is imposed. *Id.* at 718-19. *But cf.* McDowell v. State, 225 Ind. 495, 498-500, 76 N.E.2d 249, 250-51 (1947). In Michigan v. Payne, 412 U.S. 47 (1973), it was held that the prophylactic limitations *Pearce* established to guard against vindictiveness in the resentencing process were not retroactively applicable.

[41]BC § 3005 states:

> (1) Increased Sentences. Where a conviction has been set aside on direct review or collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously satisfied, unless the court concludes that a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence.
>
> (2) Reasons. The court shall set forth in detail the reasons for its action whenever a more severe sentence is imposed on resentencing.

[42]*See* Brown Report 275.

The Comments of the ABA Committee on Sentencing Standards and Procedures reveal that Standard 3.8[43] was adopted because the only class of persons who are vulnerable to increased sentences are those who have exercised their right to challenge their convictions. The ABA Committee opined that there was no basis for believing that this group of offenders deserved increased sentences any more than some other group, and the Committee further suggested that the possibility of a higher sentence was an impermissible[44] price-tag attached to a constitutional right. Moreover, it was emphasized that "greater punishment should not be inflicted *because* [one] has asserted his right to appeal."[45] Accordingly, the ABA Standards would strictly forbid more severe terms upon resentencing.[46]

That federal courts frequently apply strict constitutional standards in resentencing cases and have a distinct proclivity to disallow more severe sentences than originally imposed[47] does not obviate the fact that *Pearce,* while well-intentioned, is wholly unreasonable. In attempting to free a defendant from the fear of "vindictiveness" and "retaliatory motivation" on the part of the sentencing judge, *Pearce,* in order to "assure the absence of such

---

[43]ABA SENTENCING STANDARD 3.8:

> Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

See Green v. United States, 355 U.S. 184 (1954). *See also* North Carolina v. Pearce, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part); United States v. Benz, 282 U.S. 304, 306-07 (1931).

[44]"[P]enalizing those who chose to exercise [constitutional rights] should be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581 (1968).

[45]ABA SENTENCING STANDARD 3.8, Comment.

[46]Note 43 *supra. See* ABA SENTENCING STANDARD 3.8, Comment. *See also* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606 (1965).

The Indiana appellate courts are to be commended for adopting a position which conforms closely to the sound judgment of the ABA Committee. *See* Whited v. State, 256 Ind. 618, 271 N.E.2d 513 (1971); Eldridge v. State, 256 Ind. 113, 267 N.E.2d 48 (1971); Anderson v. State, 293 N.E.2d 222 (Ind. Ct. App. 1973). While not expressly approving Standard 3.8, the courts have definitely stressed the language in *Pearce* which places great importance on the right to appeal without fear of losing liberty for doing so.

[47]*See, e.g.,* United States v. Bell, 457 F.2d 1231 (5th Cir. 1972). *But cf.* 1965 DUKE L.J. 395.

a motivation," required that reasons for increased sentences be affirmatively set forth.[48] Without any explanation of its reasoning, the Court then required that the reasons be based on "objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceeding.*"[49] If, as Justice Black opined, the language emphasized above was set as a constitutional requirement[50] by the majority, it is submitted that the majority badly erred[51] and should be overruled. In view of *Chaffin v. Stynchcombe*,[52] however, it appears that the Court has no inclination to modify the *Pearce* holding: the *Chaffin* Court found that a jury-imposed second sentence to a harsher term was not objectionable on either double jeopardy or due process grounds, a position almost squarely supported by *Pearce*. Congress should attempt to remedy this problem, hopefully by adopting ABA Sentencing Standard 3.8 and, at the very minimum, requiring a criminal sentence to be based upon conduct *prior* to sentencing.

VII. Conclusion

This brief Comment has illustrated only a few of the provisos of S. 1 and S. 1400 which should be reevaluated and, perhaps, altered. Both proposed codifications of the federal criminal law contain sections which would greatly improve existing law; however, it is respectfully submitted that there should be a stronger effort to bring the measures, particularly S. 1400, more nearly into conformity with the carefully developed ABA Minimum Standards for Criminal Justice.

---

[48] 395 U.S. at 725, 726.

[49] *Id.* at 726 (emphasis added). *See* BC § 3005, *supra* note 41.

[50] 395 U.S. at 741 (concurring opinion).

[51] As Justice Black suggested, the Court engaged in making legislation. *Id.* Moreover, it was *ex post facto* legislation and offered no guidance as to what conduct a convicted person must avoid in order to prevent subsequent punishment which could be retroactively determined and without trial for such conduct. Justices Douglas, Marshall, and Harlan correctly indicated that the holding of *Pearce* also violated the double jeopardy clause. *Id.* at 726, 744.

[52] 412 U.S. 17 (1973).

NOTES

THE MANAGEABILITY CRISIS OF CONSUMER CLASS ACTIONS: THE SEVERE EXAMPLE OF EISEN III*

A three-judge panel of the Court of Appeals for the Second Circuit has recently decided a case which may prove to be the most significant setback in the history of the development of massive consumer class actions under rule 23 of the Federal Rules of Civil Procedure.[1] The case of *Eisen v. Carlisle & Jacquelin*[2] has

---

*The case of *Eisen v. Carlisle & Jacquelin* has been before the Court of Appeals for the Second Circuit three times. These decisions have come to be designated as follows: Eisen I, 370 F.2d 119 (2d Cir. 1966); Eisen II, 391 F.2d 555 (2d Cir. 1968); and Eisen III, 479 F.2d 1005 (2d Cir. 1973).

[1]Rule 23 of the Federal Rules of Civil Procedure controls class action litigation. It provides as follows:

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the con-

finally been dismissed as a class action[3] after seven years of highly

troversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought, or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom

controversial litigation.[4] In dismissing Eisen's class action, the court of appeals held, *inter alia,* that individual notice must be given to all "identifiable" class members, and the representative plaintiff must bear all of the cost of such strictly required notice. The opinion flatly rejects such innovations as a preliminary hearing on the merits,[5] used to determine how the costs of notice should be allocated, and the "fluid class recovery"[6] method of damage distribution. The court concluded that without such improper and illegal innovations, massive class actions of this type are impossible and must be dismissed as unmanageable.

An examination of the problems facing consumer class actions is best conducted in the context of an analysis of a case such as *Eisen.* Indeed, this case presents a rare opportunity for such a

---

allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[2]479 F.2d 1005 (2d Cir.), *cert. granted,* 94 S. Ct. 235 (1973).

[3]This case was dismissed as a class action, but "without prejudice" to any individual claim which the plantiff might still care to assert against the defendants. Note, however, that Eisen's individual claim amounted to only about $70. Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966).

[4]To this date, there are seven reported *Eisen* decisions. 41 F.R.D. 147 (S.D.N.Y. 1966); 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967); 391 F.2d 555 (2d Cir. 1968); 50 F.R.D. 471 (S.D.N.Y. 1970); 52 F.R.D. 253 (S.D.N.Y. 1971); 54 F.R.D. 565 (S.D.N.Y. 1972); 479 F.2d 1005 (2d Cir.) *cert. granted,* 94 S. Ct. 235 (1973). The extraordinary interests in this case is evidenced by the many articles which it has inspired. *See, e.g.,* Note, *Federal Rule 23(c)(2)—Notice in Class Actions*—Mullane *Reconsidered,* 43 TUL. L. REV. 369 (1969); Comment, Eisen v. Carlisle & Jacquelin, *"Frankenstein Monster Posing as a Class Action"?* 33 U. PITT. L. REV. 868 (1972); 18 AM. U.L. REV. 225 (1968); 44 N.Y.U.L. REV. 198 (1969). *See also* N.Y. Times, May 2, 1973, at 1, col. 3.

[5]The "preliminary hearing" referred to here has, perhaps inappropriately, come to be termed a "mini-hearing." 54 F.R.D. at 567. Such hearings, on the merits of a claim or otherwise, have been held to help determine whether the class action procedure is appropriate in a particular case. *See, e.g.,* Herbst v. Able, 45 F.R.D. 451 (S.D.N.Y. 1968) (preliminary hearing held to determine whether common questions predominated over individual issues as required by rule 23(b)(3)).

[6]The concept of "fluid class recovery" involves the establishment of a damage fund out of which expenses of litigation and individual claims are

study because, not only does its litigation span all of the seven years since the amendment of rule 23,[7] but, during its course, all of the major problems which face today's massive class action suits have been raised. *Eisen* is a classic example of the modern large consumer class action, and the story of its litigation is a reflection of the evolution of attitudes in the federal courts toward the application of rule 23 since its 1966 amendment.

I. BACKGROUND

In 1966, the plaintiff, Eisen, brought this class action on behalf of himself and all other persons who had, during the previous six years, invested in "odd lots"[8] on the New York Stock Exchange. Named as defendants were the two major odd-lot dealers on the New York Stock Exchange[9] and the New York Stock Exchange itself. The plaintiff charged that the odd-lot dealers had conspired to monopolize odd-lot trading and to charge excessive

---

paid. Some courts have used or suggested the use of such a fluid recovery system as an alternative to having individual claims alone form the basis of damage calculation and administration. *See, e.g.*, cases cited notes 55, 61 *infra; cf.* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587-90 (10th Cir. 1961).

[7]The old rule 23 suffered from inflexible complexities and was difficult for the courts to apply primarily because of the obscure classification of class actions as "true," "hybrid," or "spurious." *See* Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Note, 39 F.R.D. 69, 98-99 (1966) [hereinafter cited as Advisory Comm. Note]. Most cases fell into the category of spurious class actions, and the judgment in such cases would extend only to the parties to the lawsuit. This was one factor which led to the necessity of an amendment to the old rule, which, in its original form, was not achieving its objective of determining all questions in one suit. *Id. See also* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.11 (2d ed. 1969); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960). Amended rule 23 was adopted by the Supreme Court Order of Feb. 28, 1966, 383 U.S. 1031 (1966), and became effective on July 1, 1966. Under the new rule, a class action judgment is generally binding on all members of the class, with the exception that in some cases, members who seasonably request exclusion will not be bound. *See* FED. R. CIV. P. 23(c)(2), (3).

[8]While normal trading units on stock exchanges are called "round lots" and are traded in multiples of 100 shares, "odd lots" are any units traded that are smaller than the established unit of trading. Certain dealers specialize in the trading of these smaller share parcels. A consumer who purchases odd lots must pay, in addition to the normal brokerage commission, a fee known as an odd-lot differential which is based upon a fraction of a point for each share traded. *See* 391 F.2d at 559.

[9]The defendants Carlisle & Jacquelin and DeCoppet & Doremus are odd-lot traders who collectively control ninety-nine percent of the volume in odd-lot transactions. 391 F.2d at 559-60, *citing* SEC REPORT OF SPECIAL STUDIES OF

fees in violation of the Sherman Act.[10] He charged the Exchange with failure to protect the odd-lot investors as required by the Securities and Exchange Act.[11] The class which the plaintiff claimed to represent was first thought to include a maximum of around 3.7 million[12] members, but later was estimated to include as many as six million investors.[13]

Initially, some courts were reluctant to embrace a rule which would bind absent but described class members.[14] The first *Eisen* decision in 1966 reflected this early conservative approach, and, in rejecting the case as a class action, that opinion dwelt heavily upon the observation that the tremendous size and diversity of the class all but precluded its being litigated under rule 23.[15] In granting the defendants' motion to dismiss the suit as a class action, Judge Tyler found that the plaintiff had not established that he could fairly and adequately protect the interests of the class,[16] that proper notice to the class members was practically and financially impossible,[17] and that questions common to the class probably did not predominate over questions affecting individual members.[18] On appeal to the Court of Appeals for the Second Circuit, this initial rejection of the suit as a class action was reversed and remanded to the district court for a further evidentiary hearing.[19] The majority on the court of appeals deferred to the policy reasons set out in a prior appeal, which called for a liberal attitude toward class actions under rule 23, especially in cases such as this, in which, due to the small size of the in-

---

SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, 172-202, 393 (1963).

[10]15 U.S.C. §§ 1-2 (1970). *See* 41 F.R.D. at 148.

[11]15 U.S.C. 78f(b), (d), 78s(a) (1970). *See* 41 F.R.D. at 148.

[12]41 F.R.D. at 151 n.2.

[13]52 F.R.D. at 257.

[14]*See, e.g.*, School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967).

[15]Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966).

[16]*See* FED. R. CIV. P. 23(a)(4).

[17]*See id.* 23(c)(2). The court noted that in addition to the notice requirements of the rule, due process standards of notice should be strictly enforced since the new rule would make the judgment binding on any class member who did not affirmatively "opt out." 41 F.R.D. at 151. *See* note 7 *supra.*

[18]*See* FED. R. CIV. P. 23(b)(3).

[19]Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

dividual claims, the class action device represented the only practical way to adjudicate the class members' potentially meritorious rights.[20]

II. The 1968 Court of Appeals Opinion

This important 1968 opinion was the first court of appeals case interpreting that portion of the amended rule which had not been contained in old rule 23.[21] There the court rejected the district court's reliance upon quantitative factors, such as size of the class and smallness of the representative plaintiff's claim, as deciding factors for a determination of whether a class action could be maintained.[22]

In order for a case to be maintained as a class action, it must first meet four basic requirements.[23] These prerequisities are: that joinder of all members will be impracticable, that questions of law or fact are common to the class, that the plaintiff's claim is typical of the class, and that the plaintiff will serve as an adequate representative of the class. In addition to these, the case must fit within at least one of the provisions of rule 23(b). The court found that at this early stage of the proceedings the plaintiff had adequately demonstrated that the provisions of subdivision (b)(3) had been met.[24] A class action may be maintained under this subdivision when common questions of law or fact predominate over questions affecting only individual members,

---

[20]Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). On this prior appeal, the only question before the court was whether an appeal could be taken from an order of the district court dismissing a class action, but permitting litigation to continue on the plaintiff's individual claims. *See* Fed. R. Civ. P. 23(c)(1). Recognizing that such a dismissal had the practical effect of ending the lawsuit, the court held that an order of such fundamental significance was indeed appealable. Such a dismissal was called the "death knell" of the action. 370 F.2d at 121. *See generally* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292 (1970). In its most recent *Eisen* opinion, the court has indicated that it would use a similar rationale to hold that an order *permitting* the plaintiff to continue a suit as a class action is also appealable. 479 F.2d at 1007 n.1. The Second Circuit emphasized that if such a ruling were not subject to immediate appellate review, irreparable harm would be caused to the complaining party. *Id.*

[21]Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[22]The district court had emphasized that Eisen was the "sole plaintiff" among millions and that his interest was "miniscule" compared to the interests of the class as a whole. 41 F.R.D. at 151.

[23]*See* Fed. R. Civ. P. 23(a).

[24]391 F.2d at 566.

and the class action method of litigation is superior to other forms of adjudication.[25]

The court of appeals found that the district court's determination that the above requirements had not been met was, at this point, unwarranted and concluded that a closer examination would be required. In essence, the court, in 1968, found that when there is inadequate information upon which to base a determination of whether the requirements of rule 23 and due process are present, the district court must conduct evidentiary hearings. Only then could the district court properly decide whether a class action can or cannot be maintained.[26] Accordingly, the court of appeals remanded the case to the district court for such a hearing "on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper."[27] In the course of this earlier opinion, the Second Circuit declared that vindication of small claims, which otherwise may be too small to justify individual legal action, is one of the "primary functions" of the rule 23 class action.[28] The court further observed that to facilitate such broad salutary purposes, the new rule should be given a liberal, not restrictive, interpretation.[29]

Although this earlier court of appeals opinion in the *Eisen* case displayed an appropriately positive attitude toward rule 23 by rejecting a simple quantitative approach in favor of the view that it is the *function* of the class action that is paramount, there remain several questionable aspects of that opinion. These particular features of the earlier opinion are important to an analysis of the final outcome of this important case, for they led, at least in part, to the Second Circuit's ultimate rejection of this case as a class action.

First, when considering the potential problems of providing adequate notice to members of the representative plaintiff's class,

---

[25]FED. R. CIV. P. 23(b)(3).

[26]*See, e.g.*, Herbst v. Able, 45 F.R.D. 451 (S.D.N.Y. 1968) (preliminary hearing held to determine whether common questions predominated over individual issues).

[27]391 F.2d at 570. Chief Judge Lumbard dissented arguing that suitable notice was impossible and that cases such as this are unmanagable as class actions. He characterized this suit as a "Frankenstein monster posing as a class action." *Id.* at 572 (Lumbard, C.J., dissenting).

[28]*Id.* at 563, *citing* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

[29]*Id.* at 563.

the court implied that if the district court should find that a considerable number of the class members could be ascertained, then those members would be entitled to *individual notice.*[30] The court added that if financial limitations should prevent the plaintiff from furnishing such individual notice, "there may prove to be no alternative other than the dismissal of the class suit."[31] For reasons which will be considered later,[32] this aspect of the court's holding has been condemned as unnecessarily restrictive.[33]

Another questionable holding of this earlier *Eisen* opinion is the court's conclusion that this case can qualify as a class action *only* under subdivision 23(b)(3).[34] Arguably, the court which recognized that the new rule must be given a "liberal" interpretation, should not have been so quick to declare that this class action could not be maintained under either subdivision (b)(1)(A) or (b)(2). A class action is maintainable under subdivision (b)(1)(A) when there is the risk that separate lawsuits would create varying adjudications as to individual members of the class and

---

[30] *Id.* at 568-70. For this conclusion, the court looked to the requirements of due process and rule 23. Rule 23(c)(2) states that:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), for its rule that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 391 F.2d at 568, *citing* Mullane v. Central Hanover Bank & Trust Co., *supra* at 314.

[31] 391 F.2d at 570.

[32] *See* discussion of Second Circuit's most recent *Eisen* opinion *infra.*

[33] *See, e.g.*, 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972). The authors of this treatise refer specifically to Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), and, in their analysis of the court's attitude toward individual notice, go so far as to state that "[t]his decision is unnecessarily restrictive and demands more than is traditionally required to satisfy due process and more than seems necessary in Rule 23(b)(3) actions." *Id.* In its subsequent *Eisen* decision, the Second Circuit reaffirmed and amplified its earlier strict approach to the requirement of individual notice. 479 F.2d at 1009.

[34] 391 F.2d at 565.

thus establish inconsistent judicial demands upon the defendant.[35] The court felt that this subdivision was inapplicable because the expense of litigation and the smallness of any individual claims made the likelihood of separate actions by individuals and the resulting risk of incompatible adjudications extremely remote.[36] This rationale may be consistent with the court's earlier determination that an order ending this suit as a class action would, for all practical purposes, be the "death knell"[37] of the action. However, as a rationale for limiting the basis upon which a class action may be maintained, it is not entirely in keeping with the court's admonition that the new rule should be given a broad definition. Though individual lawsuits may be much less *practical* than class actions in cases such as this, obviously such suits *can* be brought, and, if they are, the risk of inconsistent adjudications seems undeniable.[38] Also, it must not be overlooked that a successful antitrust plaintiff can collect triple damages[39] and, of course, reasonable attorney's fees.[40] Therefore, individual lawsuits are not entirely out of the question, and, given the need for a liberal application of the rule, subdivision (b) (1) (A) should not be summarily ruled out.

Similarly, the court rejected the possibility that this suit could be maintained under subdivision (b) (2) of rule 23.[41] This provision of the rule is meant to apply to cases in which the relief sought is exclusively or predominantly injunctive or declaratory.[42] Obviously, in *Eisen* the plaintiff sought primarily monetary damages, but it was argued early in the litigation that the size of the class and the smallness of individual claims would render a distribution of monetary damages unfeasible. Ultimately, this was one of the reasons for the court's rejection of this class action.[43] Thus, it was foreseeable at the outset that money damages might not be appropriate final relief in this case. With reference to subdi-

---

[35]FED. R. CIV. P. 23(b)(1)(A).

[36]391 F.2d at 564.

[37]370 F.2d at 121. *See* note 19 *supra.*

[38]*See* 44 N.Y.U.L. REV. 198, 201-02 (1969).

[39]15 U.S.C. § 15 (1970).

[40]*See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1803 (1972).

[41]391 F.2d at 564.

[42]FED. R. CIV. P. 23(b)(2). *See also* Advisory Comm. Note, 39 F.R.D. at 102.

[43]479 F.2d at 1017. The court ultimately concluded that:

the amounts payable to individual claimants would be so low as to be

vision (b)(2), the Advisory Committee's Note to the Proposed Rules of Civil Procedure provides that this "subdivision does not extend to cases in which the *appropriate* final relief relates exclusively or predominantly to money damages."[44] Eisen requested equitable relief in his complaint. It was clear from the beginning that he could ultimately be prevented from pursuing his class action because money damages would prove unmanageable.[45] Under these circumstances, nothing in the rule prohibits recourse to subdivision (b)(2).

The reason that subdivisions (b)(1) and (b)(2) are such attractive alternatives is their lesser notice requirements. The notice requirement of 23(c)(2), which calls for "individual notice to all members who can be identified through reasonable effort,"[46] applies only to actions brought under subdivision (b)(3). Due process may require some form of notice in class actions under subdivisions (b)(1) and (b)(2).[47] However, there is no provision in the rule whereby class members may elect to be excluded from actions maintained under these two subdivisions; thus, notice is less vital in class actions which are not brought under subdivision (b)(3). It was the Second Circuit's emphasis upon a notice requirement which led to its eventual rejection of this class action.[48] Dismissal may not have become necessary had the court not rejected all the potentially viable alternatives at such an early stage.[49]

---

negligible [and this] should have been enough of itself to warrant dismissal as a class action.

Id.

[44]Advisory Comm. Note, 30 F.R.D. at 102 (emphasis added).

[45]One of the matters which rule 23 provides must be considered to determine whether a class action can be maintained under 23(b)(3) is "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D).

[46]*Id.* 23(c)(2).

[47]*But see* Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972) (notice not required in 23(b)(2) actions).

[48]479 F.2d at 1015.

[49]It must be noted that resort to subdivisions (b)(1)(A) or (b)(2) may only be necessitated if the notice requirements of (b)(3) are interpreted as being so demanding that they effectively preclude large consumer class actions under the latter subdivision. Obviously, it would be better to avoid any necessity of attempting to juggle the classification of actions under rule 23(b). This, after all, was one of the defects which made the old rule so cumbersome. *See* Advisory Comm. Note, 39 F.R.D. at 98. *See also* Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by Securities Laws*, 116 U. PA. L. REV. 889, 916-17 (1968). However, it is submitted that such juggling may be preferable to an alternative which would

III. The District Court's Approach

The case was remanded to the district court. Judge Tyler then made an extraordinary about-face from his previous decision. Five years after his firm dismissal of this case as a class action, Judge Tyler allowed the plaintiff to proceed under rule 23, and in so doing, rendered a decision which went as far as any federal court has gone in accommodating massive consumer class litigation.[50] In three reported opinions, Judge Tyler called for a more extensive hearing to gather necessary information,[51] found that the case was manageable as a class action,[52] and, after an additional evidentiary hearing on the merits, determined that the defendants should bear ninety percent of the cost of notice to the class.[53]

On remand, the district court first made findings of fact based upon information which had been submitted by the parties. These findings dealt primarily with the make-up of the plaintiff class and the transactions and charges which were the basis of the harm alleged to have been done to the class members.[54] The court also made certain findings as to how other courts had handled the complexities of similar litigation involving many parties and large recoveries.[55] The district court then turned to the crucial questions to be considered on remand. First, under the guidelines set out by

---

make the class action remedy unavailable for antitrust, consumer, and environmental litigation.

[50]Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

[51]Eisen v. Carlisle & Jacquelin, 50 F.R.D. 471 (S.D.N.Y. 1970). Judge Tyler called upon the parties to provide additional information concerning the crucial issues of manageability and notice.

[52]Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

[53]Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972). This allocation of the cost of notice was based upon the finding at the preliminary hearing that "plaintiff and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment." *Id.* at 573.

[54]52 F.R.D. at 256-59. The court's findings included, *inter alia* that: there were approximately six million class members for the period in question, the typical class member had approximately five odd-lot transactions during that period, approximately 1,967 members had ten or more such transactions during the period, the average odd-lot differential per transaction was about $5.18, two million of the class members were identifiable from computer tapes and other records of brokerage and odd-lot firms, and the remaining four million class members could not be identified with reasonable effort.

[55]52 F.R.D. at 259-60. The court referred to the similarly complex cases of Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass. 1962), and West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) [hereinafter cited as *Drug Cases*].

the court of appeals, it was not difficult to find that the plaintiff, as representative party, would be an adequate representative of his class.[56] The remainder of Judge Tyler's considered and lengthy opinion dealt with the complex question of manageability of the class action,[57] including the mechanics of administration, the computation and distribution of damages, the form of notice appropriate in this case, and allocation of the cost of notice.

A. Damages

In a massive consumer class action of this type, with its huge class and small individual recoveries, naturally, the problem of handling the damages aspects of a case are considerable.[58] Central to the court's conclusions in this regard was its finding that a fair estimate of the damages in this case was possible without the filing of individual claims by each class member.[59] In regard to the problems of administering any eventual damage recovery, the court looked for guidance to prior experiences in the administration of the *Drug Cases*[60] and found precedent in those and other recent

---

[56] 52 F.R.D. at 261. *See* FED. R. CIV. P. 23(a)(4). The court of appeals had indicated the factors to be considered in this determination were: plaintiff's general qualifications and ability to conduct such litigation, the possibility of collusion or of plaintiff's having interests antagonistic to those of the class, plaintiff's general interest to insure his forceful advocacy, and the likelihood that the class would accept the plaintiff as their representative. 391 F.2d at 562-63.

[57] FED. R. CIV. P. 23(b)(3)(D) provides that one of the matters pertinent to the finding that a class action of this type may be maintained is, "the difficulties likely to be encountered in the management of the class action."

[58] *See generally* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 (1971); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Note, *Damages in Class Actions: Determination and Allocation*, in *The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 615 (1969); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971); Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768 (1965).

[59] 52 F.R.D. at 262. The court said that as sources for its computations, it could look to various records and reports. *Id.* But the significant factor in its determination that the filing of individual claims would not be essential was the fact that the same allegedly excessive charge was made to all class members in all odd-lot transactions. *Id. See* 391 F.2d at 562; *cf.* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971), in which the court found that the damages problem in such vast class actions could be handled, but not in a case which lacked such factors as price uniformity.

[60] *Drug Cases, supra* note 55. These cases were a series of civil suits filed by various government entities and drug sellers alleging violation of antitrust

cases for a type of "fluid class recovery."[61] Though the court made no final ruling on the nature of the recovery that might eventually be allowed, it found the fluid class concepts to be of sufficient merit to establish a presumption that some adequate method of distribution could be found.[62]

The court found that because each alleged wrong, taken separately, was too small to have any true "litigable significance," any eventual distribution of recovery need not be limited strictly to "personal" recoupment of damages.[63] The court added, however, that individual recovery was not ruled out, in that any such claims could be honored if properly filed.[64] Fluid class recovery contemplates distribution to the class as a whole usually by the creation of a fund made up of unclaimed damages.[65] In this case, it was suggested that the best way of benefiting the original class would be to reduce the odd-lot differential over a period of time until the

---

laws. The suits were consolidated into one class action. Settlement of 100 million dollars was eventually offered by the defendant drug manufacturers. The defendants in *Eisen* argued that the *Drug Cases* were not applicable because there the parties reached an agreed-upon settlement from which a fund was established for damage compensation. In short, the *Drug Cases* were not litigated to the "bitter end." 52 F.R.D. at 262. Judge Tyler, however, in rejecting this distinction, found that if liability was eventually established in this case, the court's task of distribution would be essentially the same as it was in the *Drug Cases*. *Id.*

[61] In addition to the *Drug Cases*, the court relied upon Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (court established fund used to decrease fare after transit users had been overcharged through wrongful rate increase), and Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (class action involving excessive rates on taxicab meters with settlement out of court and approximately one million dollars returned to the class by reduction of taxicab fares).

Of the cases relied upon by the district court as precedent for fluid class recovery, the *Drug Cases* are thought to be the most applicable because of the court's recognition that the establishment of a total damage figure as recovery for the class as a whole does not infringe upon the defendants' due process rights. *See In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281-82 (S.D.N.Y. 1971) (one of several opinions arising from discovery proceedings which followed the earlier *Drug Cases*). *See generally* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971).

[62] 52 F.R.D. at 265.

[63] *Id.* at 264.

[64] *Id.*

[65] *Id. See generally* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477 (1972).

fund was depleted.[66] It was recognized that without a significant recovery the expense of administering such a damage procedure might make any eventual distribution insignificant and perhaps unjustified. However, the court's estimation of potential damages at around twenty-two million dollars indicated that a sufficient recovery would be available for distribution.[67]

B. Notice

Undoubtedly, the notice requirements of rule 23 and due process present the major manageability problem of large consumer class actions.[68] Indeed, the problems associated with notice requirements raise the specter that such actions may be deemed impossible. Judge Tyler examined the notice requirements of rule 23 and due process and found that in this particular case they could be met "without imposing what in effect amounts to an insufferable tariff on the prosecution of the case."[69] The cases of *Mullane v. Central Hanover Bank & Trust Co.*[70] and *Hansberry v. Lee*[71] indicated to the court that the goal of constitutionally required notice is to provide for fair and adequate protection of all parties' interests in the action.[72] The court also noted that rule 23(c)(2) specifically

---

[66]52 F.R.D. at 265. It was suggested that the Securities and Exchange Commission [hereinafter referred to as SEC] could either approve or supervise such rate regulation. *Id.*

[67]*Id.*

[68]*See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 396 (1967); Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139 (1969); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971); Note, Federal Rule 23(c)(2)—*Notice in Class Actions*—Mullane *Reconsidered*, 43 TUL. L. REV. 369 (1969).

[69]52 F.R.D. at 266-67.

[70]339 U.S. 306 (1950).

[71]311 U.S. 32 (1940).

[72]*Mullane* provided that due process requires "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. The district court in *Eisen* properly saw the *Mullane* standard as one of flexible practicality which must be applied on a case-by-case basis. "[I]f with due regard for the *practicalities and peculiarities of the case* these conditions are reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15 (emphasis added). "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where

calls for the "best notice *practicable under the circumstances*, including individual notice to all members who can be identified with *reasonable* effort."[73] Since the rule was intended to reflect the requirements of due process,[74] the court felt that the notice requirements of the rule should be interpreted in light of the actual need for a notice procedure designed to enable class members to protect their rights in the litigation.

The question of adequate notice must be approached on a case-by-case basis,[75] and in this case the following factors combined to enable the court to conclude that overemphasis upon strictly required notice to individual class members was particularly unjustified. First, because individual claims were so small, the likelihood that any class members would wish to exclude themselves from the action was extremely remote.[76] Second, the statute of limitations had run so that any res judicata consequences, should the plaintiff lose his case, were thought to be of little significance to other class members. And finally, the court recognized the need to balance between the demand for expensive and stringent notice requirements and the reality that overemphasis of such notice could nullify the class action device.[77]

In light of all these considerations, the district court then outlined a notice procedure which it deemed a realistic and fair accommodation of the interests of all the parties. The notice which

---

it is *not reasonably possible or practicable* to give more adequate warning." *Id.* at 317 (emphasis added).

The *Hansberry* case emphasized the importance of protecting the interests of absent class members by insuring that the representative plaintiff had substantially similar and unconflicting interests. *See* 311 U.S. at 45.

[73]FED. R. CIV. P. 23(c)(2) (emphasis added).

[74]*See* Advisory Comm. Note, 39 F.R.D. at 107.

[75]*See* note 69 *supra*. The Advisory Committee states that "[n]otice to members of the class, *whenever* employed under amended rule 23, should be accommodated to the *particular purpose* but need not comply with the formalities for service of process." Advisory Comm. Note, 39 F.R.D. at 107 (emphasis added).

[76]*See* FED. R. CIV. P. 23(c)(2), (3), which provides that class members who do not wish to be bound by the judgment may request exclusion. *See also* Berland v. Mack, 48 F.R.D. 121, 129 n.3 (S.D.N.Y. 1969).

[77]52 F.R.D. at 266. *See also* Herbst v. Able, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 497 (E.D.N.Y. 1968).

At this point, the district court emphasized public policy considerations and the importance of the class action device—especially in such areas as private antitrust, consumer, and environmental litigation. 52 F.R.D. at 266.

the court proposed included the following: individual notice to all member firms of the New York Stock Exchange and all commercial banks with large trust departments,[78] individual notice by mail to approximately 7,000 class members, 2,000 of whom consisted of the group who were found to have had ten or more odd-lot transactions during the relevant period, and 5,000 others selected at random from those remaining "identifiable" class members,[79] and lastly, notice by publication to the remander of the class.[80]

C. *Cost of Notice*

Having treated the issues of damages and appropriate notice, the only remaining problem for the district court was the question of who must pay for the notice that would be required. The court of appeals had indicated that the plaintiff must bear this burden,[81] but the district court viewed the more recent Second Circuit case of *Green v. Wolf Corp.*[82] as an indication that the question remained

---

[78]52 F.R.D. at 267.

[79]*Id.*

[80]The court-proposed notice by publication consisted of one-quarter page notice once each month for two consecutive months in the following publications: 1) the national edition of the *Wall Street Journal*, 2) the financial section of the *New York Times*, 3) the financial sections of the *San Francisco Chronicle* and *San Francisco Examiner*, and 4) the financial section of the *Los Angeles Times*. *Id.* at 268.

To these provisions for notice, the district court made the following qualification:

> Assuming that a significant number of class members should exclude themselves, this might be viewed as an indication that the interests of the class are not being adequately represented. In such event, to properly consider the question of whether defendants should be shielded from the expense and effort of defending a suit which a large number of class members may not favor, further individual notice might then be required. On the other hand, a lack of response to the notice would not shed any light on adequacy of representation and would probably mean that the notice was sufficient for this case.

Id. This indication of a willingness to require further individual notice if needed is further evidence of the district court's view of its own flexible adaptability in what it considers an area in which due process and rule 23 allow practical-minded discretion.

[81]391 F.2d at 568.

[82]406 F.2d 291 (2d Cir. 1968). In *Green* the court of appeals observed that district courts had gone both ways on the question of whether the cost of notice could be allocated between the parties. No preference was expressed for either view. *Id.* at 301-02 n.15. *Compare* Dolgow v. Anderson, 43 F.R.D. 472, 497-98 (E.D.N.Y. 1968), *with* Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

open. Eisen had acknowledged from the outset that he could not afford to pay for the notice, even in the less stringent form which the district court ultimately required. Thus, an imposition of the inflexible requirement that the plaintiff must always pay the expense of the notice would result in an abrupt termination of this case.[83] It is clear that this same result would occur in many similar large class actions. Thus, if the plaintiff must always bear the expense of notice, most consumer class actions would end without reaching the merits.

Judge Tyler felt that the power to allocate the cost of notice was within the broad discretion of the trial court,[84] especially when strict adherence to the usual rule[85] would mean the dismissal of a possibly meritorious suit supported by strong public policy considerations. However, recognizing that arbitrarily placing the burden of costs upon the defendant might result in an unfair imposition based upon a frivolous claim and could encourage use of the class action device as a harassment technique, the court set out a series of factors which are important considerations for justifying shifting some of this burden to the defendant. Foremost of these considerations was the fact that private class actions provide one of the few viable methods of enforcing antitrust laws, and they

---

[83] 52 F.R.D. at 269.

[84]

> Rule 23 grants to the court broad discretionary powers to enable the court successfully to solve the novel administrative problems posed in a class action by the unusually large number of members of the class, each of whom may have small monetary claims.

MANUAL FOR COMPLEX LITIGATION 29 (West Pub. 1973).

[85] The court conceded that ordinarily the plaintiff would be required to pay the costs of notice. 52 F.R.D. at 269, *citing* Weiss v. Tenney Corp., 47 F.R.D. 283, 294 (S.D.N.Y. 1969); Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967); Frankel, *Amended Rule 23 from a Judge's Point of View* in *Symposium, "Amended Federal Rule 23: Antitrust Class Actions?* 32 A.B.A. ANTITRUST L.J. 295, 300 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I)* 81 HARV. L. REV. 356, 398 n.157 (1967); Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* in *The Class Action—A Symposium,* 10 B.C. IND. & COM. L. REV. 557, 566-67 (1969). However, certain other cases and commentators were cited for recognizing the "propriety of apportioning the burdens in certain cases." 52 F.R.D. at 269, *citing* Bragalini v. Biblowitz, CCH FED. SEC. LAW RPTR. ¶ 92,537 (S.D.N.Y. 1969); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968); Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968); *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 938 (1958); Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement,* 29 MD. L. REV. 139, 156 (1969).

are the *only* method of insuring that violators do not keep their illegal profits and that the damaged class is compensated as much as possible.[86] Here, since the statute of limitations had run, it could be argued that Eisen's class action was the only way to litigate these particular antitrust claims. It is frequently observed that rule 23 requires a liberal interpretation, and the court felt that such a construction is particularly applicable when, as here, there was strong reason to believe that the plaintiff's suit was not frivolous.[87] From these considerations, the court concluded that it would be unfair to put the full burden of notice costs upon the plaintiff before ascertaining more about the merits of his claim.

Requiring the defendants to bear this expense was recognized as a significant imposition, but the court drew support from an analogy to the preliminary injunction remedy.[88] The preliminary injunction was seen as a similarly burdensome imposition which is sometimes placed upon defendants when necessitated by "the need to create or preserve a state of affairs which will enable the court to render a meaningful decision."[89] As with the preliminary injunction, however, the court emphasized that this pretrial burden of notice costs should not be placed upon the defendant unless the plaintiff can make a strong showing that he is likely to succeed at trial. In other words, for the court to be swayed in this discretionary posture, much depends upon the merits of the plaintiff's claim. And so, for the purpose of determining how to allocate the costs of notice, Judge Tyler ordered a preliminary hearing on the merits of Eisen's case.[90]

The subsequent preliminary hearing revealed enough of the merits of the plaintiff's claims for the court to determine that the plaintiff and his class were "more than likely" to prevail.[91] The court stressed, however, that this finding would not be binding in

---

[86]52 F.R.D. at 270. *See also* Dolgow v. Anderson, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968).

[87]52 F.R.D. at 270. The court cited studies by the SEC and the New York Stock Exchange and the subsequent reduction of the odd-lot differential by approximately five million dollars per year.

[88]*Id.* at 270-71. *See also* Dolgow v. Anderson, 43 F.R.D. 472, 502 (E.D.N.Y. 1968).

[89]52 F.R.D. at 270.

[90]It was noted that several courts had rejected such a hearing, but the court claimed that "the facts and circumstances of those cases were markedly different from those at hand. . . ." *Id.* at 271.

[91]54 F.R.D. at 573.

the ultimate trial on the merits and that the purpose of the hearing was strictly limited to a determination of whether, and if so, how, the costs of notice to the class were to be allocated among the parties. Judge Tyler's ultimate conclusion was that the defendants should bear ninety percent of these notice costs. Though its approach to class actions was short-lived as legal precedent, the district court's holdings in the *Eisen* case met with a generally positive reaction.[92]

IV. Reversal by the Court of Appeals

In a three-judge panel opinion written by Judge Medina, the Court of Appeals for the Second Circuit resolutely reversed the district court's rulings.[93] On each of the dominant issues in this case—damages, appropriate notice, allocation of costs, and the preliminary hearing on the merits—the court of appeals opinion expressed complete disagreement with Judge Tyler's conclusions.[94] The findings and conclusions based upon the district court's preliminary hearing on the merits were vacated and set aside. The various rulings of the district court which had sustained the *Eisen* case as a class action were reversed, and, as a class action, the case was dismissed.[95]

---

[92]*See* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1786 (1972); Comment, Eisen v. Carlisle & Jacquelin, *"Frankenstein Monster Posing as a Class Action"?*, 33 U. Pitt. L. Rev. 868 (1972).

[93]Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *cert. granted*, 94 S. Ct. 235 (1973).

[94]As will be seen in the discussion that follows, this opinion by Judge Medina was indeed "resolute" in its total rejection of the lower court's various rulings. It is doubtful, however, that such an adamant position is prevailing. In this decision, Judge Lumbard concurred, but Judge Hays concurred only in the result. Judge Hays stated that he could not accept the district court's allocation of the costs of notice, thus indicating that he would probably not totally reject the district court's other holdings. 479 F.2d at 1020 (Hays, J., concurring). In the opinion denying an en banc rehearing of the case, in which four judges concurred, Judge Kaufman wrote that the primary reason for denying further consideration of the case was to avoid delay in its reaching the Supreme Court. *Id.* at 1020-21. Judge Mansfield concurred in Judge Kaufman's opinion, and expressed the same presumption that the Supreme Court would grant certiorari. *Id.* at 1021 (Mansfield, J., concurring). Judge Hays dissented from the court's denial of en banc rehearing. *Id.* (Hays, J., dissenting). Finally, Judge Oakes, with whom Judge Timbers concurred, wrote a forceful dissent expressing grave concern about the panel's "very doubtful" result and arguing in favor of the court's hearing this matter en banc. *Id.* at 1021-26 (Oakes, J., dissenting).

[95]The court of appeals did not reach the merits of Eisen's claims against the defendants. *See* 479 F.2d at 1013.

A. *Fluid Class Recovery*

The court of appeals opinion saw the fluid class recovery method of handling damages as an illegal innovation resorted to in desperation to pull the case out of its "morass" of "hopeless" unmanageability.[96] This rejection of fluid class recovery was based upon three critical observations. First, the court could not see how the damages could be distributed to the class.[97] Second, the fluid class recovery is not supported by the "respectable precedent" upon which the district court had relied.[98] Lastly, this recovery method would award damages to persons who had not been injured, since all members of the "fluid class" would not have been investors in the odd-lot market during the pertinent time period.[99] The court of appeals concluded that the fluid class recovery techniques are not authorized by rule 23.[100]

The district court had found that the damage fund might be depleted by reducing the odd-lot differential by a reasonable amount over a period of time.[101] The court of appeals saw this method of distribution as precluded by the fact that only the SEC has the

---

[96]*Id.* at 1010.

[97]*Id.* at 1011. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971). This court, while recognizing that Judge Tyler's method of *establishing* damages may have been acceptable in the context of the *Eisen* case, found that to attempt an eventual distribution would be unrealistic for the group there under consideration. *Id.* at 71-73. *But see* 44 N.Y.U.L. REV. 198, 204 (1969).

[98]479 F.2d at 1012.

[99]*Id.* at 1010, 1014, 1018.

[100]The court also concluded that even if rule 23 does permit fluid class recovery, such a procedure would have to be rejected "as an unconstitutional violation of the requirement of due process of law." *Id.* at 1018. However, the court offered no further explanation of how the recovery procedures proposed by the district court actually violated due process. *See In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281-82 (S.D.N.Y. 1971) (no violation of due process found in fluid recovery procedure).

[101]52 F.R.D. at 265; *cf.* Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir), *cert. denied*, 373 U.S. 913 (1963); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Such a damage distribution has been compared with the doctrine of *cy pres*, which aims at substantial justice when perfect justice cannot be done. *See* Pomerantz, *New Developments in Class Action—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1260-65 (1970). *See also* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 510 (1972).

power to fix rates or establish a rate's effective time period.[102] However, the district court had noted the SEC's probable exclusive jurisdiction but felt that any reduction in differential could be carried out with SEC approval or supervision.[103] The district court's proposed method of distribution of unclaimed damages was not final or inflexible and could have been made contingent upon the voluntary cooperation of the SEC.[104]

In extremely large class actions, the requirement of individual claims to establish the defendant's liability creates a tremendous task which often would be impossible or impractical.[105] As mentioned earlier, fluid class recovery seeks to avoid this problem by treating the "class as a whole" as the recipient of a precalculated damage award. Obviously, such a system of providing recovery is not precise; any award which is aimed at such a large group is bound to lack the rigid accuracy which is demanded in normal adversary proceedings involving a single plaintiff and single defendant. Here, for example, a distribution of the damage fund through the reduction of the odd-lot differential is bound to benefit some individuals who were not odd-lot investors during the period of the alleged antitrust violations. Such persons, presumably, were not injured as the plaintiff and his class claim to have been. For fluid recovery to be appropriate in these situations, there should be a sufficiently high level of repetitive activity to enable the court to predict that the persons benefited by the damage award are, by and large, the same group that was injured.[106] It should be

---

[102]479 F.2d at 1011, *citing* 15 U.S.C. §§ 78k(b), 78s(b) (1970).

[103]52 F.R.D. at 265; *see* note 66 *supra.*

[104]*See* Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (SEC participation as party or amicus curiae suggested). The district court conceded that the argument against "judicial rate-fixing" had certain merit. 52 F.R.D. at 265. It is submitted, however, that the SEC's power to regulate rates should not necessarily prevent the courts from exercising their power to redress antitrust violations in the regulated industries. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963). In fact, it has been suggested that the presence of supervisory agencies such as the Public Utilities Commissions or the SEC actually facilitates the use of fluid class recovery. *See* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 370 (1971).

[105]*See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

[106]*See* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 370-72 (1971). The district court made findings concerning the stability of the class in this case, 52 F.R.D. at 257, and ultimately determined that a method of recovery of unclaimed dam-

remembered that the aim of fluid class recovery is substantial justice, and its probable alternative is no justice at all.[107]

The court of appeals was particularly offended by this lack of precision. It pointed out that section 4 of the Clayton Act authorizes triple action damage suits only to persons who have been "injured in [their] person or property by reason of anything forbidden in the antitrust laws. . . ."[108] The right of recovery under the antitrust laws is a substantive right which cannot be enlarged by any of the Federal Rules of Civil Procedure.[109] Thus, it was argued that the plaintiff cannot sue for the benefit of parties who have not been injured as he or his class are alleged to have been. The court of appeals viewed the fluid class recovery, with its inevitable benefit to some uninjured parties, as a clear infraction of the statutory limitation.[110] However, the court did not mention the various propositions which would avoid that conclusion. One could argue that damages are not, in fact, being awarded to uninjured parties. Any uninjured parties who are ultimately benefited by the fluid recovery method may be said to have been benefited in an "indirect" manner under an assignment theory. This assignment could be implemented through a notice program which informs the class that any unclaimed damages which have been sustained by the class as a whole will be deemed to have been assigned for the benefit of future odd-lot customers.[111] While the statute may limit who may

---

ages could be employed to *substantially* benefit the whole class. *Id.* at 264-65. The court of appeals apparently felt that the district court's estimate of class stability was neither "reliable" nor "rational," but offered no statistics to counter the district court's conclusions. 479 F.2d at 1010. It must be noted, however, that time works in favor of Judge Medina's argument, and as more individuals engage in odd-lot transactions, a higher percentage of those benefited by the eventual award will not be individuals who were originally damaged.

[107]The expense of requiring and administering individual claims is prohibitive in actions with millions of small claimants, and, of course, if actions by massive consumer groups are frustrated in this way, antitrust and other offenders will continue to reap the benefits of their illegal activities.

[108]15 U.S.C. § 15 (1970). The court also cited Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), for the proposition that only persons actually injured in their business or property can claim damages under the Clayton Act. 479 F.2d at 1014.

[109]470 F.2d at 1014, *citing* 28 U.S.C. § 2072 (1970) (the Enabling Act which authorizes the Supreme Court to promulgate its procedural rules).

[110]479 F.2d at 1014.

[111]This "assignment technique" was accomplished in the *Drug Cases* by use of a notice program under which those members of the injured class who

bring an action, it does not limit what such persons can do with their recovery once liability to them has been established.

The court of appeals distinguished the three cases which the district court referred to as "respectable precedent" for its fluid class recovery.[112] These cases were "distinguished" as follows: the *Drug Cases* involved a settlement, *Bebchick v. Public Utilities Commission*[113] was not a class action under rule 23 and those who had been damaged could not be identified, and finally, *Daar v. Yellow Cab Co.*[114] did not involve rule 23 (though it was a class action), and there the court had indicated that proof of individual claims may have ultimately been required.[115] Certainly, there are many factors which distinguish these cases from *Eisen;* however, the methods of handling damages which were either suggested or actually used are clearly analogous. This is particularly true of the *Drug Cases.*[116] Although in the *Drug Cases* the fluid class recovery arose in the context of a settlement, that settlement was expressly approved by the court.[117] The settlement, otherwise like a distribution of damages, was implemented by a classic example of the fluid class recovery method. A necessary predicate to approval of the settlement was the court's finding that the case, with its dependence upon fluid class recovery, was maintainable as a class action.

---

did not assert individual claims were deemed to assign their rights to the attorneys general of the states involved in the action. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1091 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). *See also* 7A C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1784 (1972).

[112]*See* 52 F.R.D. at 264. The district court relied upon the *Drug Cases*—West Virginia v. Chas. Pfizer & Co., 314 F.Supp 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971), Bebchick v. Public Util. Comm'n 318 F.2d 187 (D.C. Cir.), *cert denied,* 373 U.S. 913 (1963), and Daar v. Yellow Cab Co., 57 Cal.2d 695, 433 P.2d 732, 63 Calfl Rptr. 724 (1967). *See* notes 60, 61, *supra.*

[113]318 F.2d 187 (D.C. Cir.) *cert. denied,* 373 U.S. 913 (1963).

[114]67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). The *Daar* case was brought under a state class action statute.

[115]479 F.2d at 1014, *citing* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

[116]Judge Tyler had recognized that the *Drug Cases* involved a settlement, but rejected the distinction. 52 F.R.D. at 262; *see* note 60 *supra.*

[117]West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). *See also In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281 (S.D.N.Y. 1971).

As precedent weighing against treating claims collectively, the court of appeals relied upon *Snyder v. Harris,*[118] in which the Supreme Court refused to allow aggregation of the claims of class members to meet the federal court's jurisdictional amount. The court of appeals concluded that this proscribes any consideration of a single damage figure for "the class as a whole."[119] The court's penchant for distinguishing cases would have been better applied to *Snyder.* The *Snyder* case involved an attempt to expand federal diversity jurisdiction. Policies which limit that jurisdiction would seem to have little or no applicability in cases brought under federal statutes pursuant to which federal jurisdiction exists without regard to the amount in controversy. In *Snyder,* the Court emphasized the purposes of the congressionally enacted grant of limited jurisdiction, and these purposes concern restricting access to the federal courts.[120] The reasons for rejecting an attempt to gain access to the federal courts by aggregating claims are entirely inapplicable to the reasons for making a single award to the class after a federal court has acknowledged jurisdiction, tried the case, and determined the defendant's liability to the plaintiff class.

B. Notice

With the exception of the 7,000 class members designated by the district court to receive individual notice, the court of appeals completely rejected the notice provisions which Judge Tyler felt would be adequate in this case. After calling the proposed notice "a totally inadequate compliance with the notice requirements of amended Rule 23,"[121] the court added that, in cases with classes this large, "notices by publication . . . are a farce."[122] As a basis for its rejection of the district court's detailed notice plan, the court of appeals adopted a strict, literal interpretation of the rule 23 notice requirement for 23(b)(3) actions.[123] The court of appeals felt that the rule required individual notice to each "identifiable" member of the class. However, there are compelling considerations which mitigate against such an interpretation, and, unless the words of the rule absolutely require this strict construction, it should be avoided.

---

[118]394 U.S. 332 (1969).

[119]479 F.2d at 1014.

[120]*See* 394 U.S. at 339-40.

[121]479 F.2d at 1009.

[122]*Id.* at 1017.

[123]FED. R. CIV. P. 23(c)(2).

Little was said in this opinion about the due process requirements upon which the notice provisions of rule 23 are based.[124] The district court pointed out, and many commentators agree, that it is quite unlikely that due process would require individual notice to every known party who may have an interest in the litigation.[125] The *Mullane* case, which dealt with a much smaller group of interested parties, was couched in terms of practicability, with emphasis upon such considerations as a large banking facility's ability to give individual notice, the relatively small expense involved in giving notice, and the reasonableness of the required good faith effort to reach most interested parties.[126] Several courts have recognized that this emphasis upon practicability is especially appropriate in

---

[124]The Advisory Committee states that the (c)(2) notice is designed to fufill the requirements of due process. *See* Advisory Comm. Note, 39 F.R.D. at 106-07.

[125]52 F.R.D. at 265-68. *See also* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 646 (1971); Comment, *Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2)*, in *The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 571 (1969); Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 153-54 (1969); Note, *Federal Rule 23(c)(2)—Notice in Class Actions*—Mullane *Reconsidered*, 43 TUL. L. REV. 369 (1969).

[126]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *see* note 72 *supra*. In *Mullane* the notice being tested was that provided by statute to inform trust fund beneficiaries of a trustee's management of fund assets. In rejecting the statutory notice as inadequate, the Supreme Court explained:

> The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could *easily* be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and *inexpensive* means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting *would not seriously burden the plan.*

339 U.S. at 319 (emphasis added). The *Mullane* Court was careful to point out that "a construction of the Due Process Clause which would place impossible or impractical obstacles in the way would not be justified." *Id.* at 313-14. It is true that under the circumstances of that case, the Court required individual written notice to beneficiaries because the existence of their names and addresses on trust company records made such notice practicable. *Id.* at 318-20. It is submitted, however, that the mere existence of lists containing the names and addresses of two million class members does not render individual notice to them "practicable." *See also* Harris v. Jones, 41 F.R.D. 70, 74 (D. Utah 1966) (requiring individual notice under 23(c)(2) only so far as practical).

large class actions. These courts have looked to the circumstances of various cases facing them and have concluded that overemphasis of an individual notice requirement would, in certain situations, defeat the purpose of class actions.[127] Demands for individual notice in large class actions should not be allowed to present a barrier of prohibitive expense when there is some constitutionally adequate alternative method of giving notice which would enable class members to protect their rights in the litigation.[128]

The narrow construction given the rule by the court of appeals decision is neither supported by the reasoning which makes some notice mandatory nor is it necessarily required by the actual words of the rule. The purpose of a notice requirement in (b) (3) class actions is to inform absent class members of the proceedings so that they can either participate or "opt out" to avoid any res judicata effects of an adverse judgment.[129] However, in large class actions such as this, in which there are so many small claims, financial considerations usually will prevent either prosecution of separate actions or active participation in the present action. Obviously, there would seldom, if ever, be any reason to seek exclusion from the class.[130] This practical consideration, which minimizes the need for notice in these cases, simply cannot be ignored.

---

[127]*See, e.g.*, Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

[128]As the district court stated in Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969):

> Rule 23(c)(2) requires the best notice "practicable," not perfect notice. The word "practicable" implies flexibility, with the type of notice depending upon the particular circumstances of each case. Where members of the class are readily identifiable and personal notice would not be so prohibitively expensive as to prevent the class action from being prosecuted, individual notices by first class mail would in most cases be the "best notice practicable." But where members are difficult to locate or identify, the benefits of a class action should not be denied altogether, in the absence of evidence that there is no method of giving a notice that is reasonably calculated to apprise the class members of their opportunity to object. Rule 23 contemplates cooperative ingenuity on the part of counsel and the court in determining the most suitable notice in each case.

Id. at 129.

[129]*See* Advisory Comm. Note, 39 F.R.D. at 104-05, 107.

[130]*See* Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 637 (1971). *See also* note 76 *supra* & accompanying text.

Again, the words of the rule require the court to direct "the best notice *practicable under the circumstances,* including individual notice to all members who can be identified *through reasonable effort.*"[131] Certainly, notice in 23(c)(2) is mandatory, but these words do vest the courts with some discretion. The special qualities of class actions of this type demand special consideration. Rule 23 requires a liberal interpretation,[132] and the amended rule was intended to broaden the usefulness of the class action.[133] Notice is designed to serve the needs of the class members; it would be a bitter irony if the notice requirement serves instead to deprive them of the only real opportunity to litigate their claims.

These considerations call for an enlightened interpretation—how then should the words of this rule be applied to a case such as *Eisen*? The mere existence of a list of names and addresses of two million individuals (produced, of course, through the efforts of the defendants) does make those class members "identifiable" in the strict sense of the word, but does not necessarily render those individuals ascertainable for notification purposes "through reasonable effort" as the phrase is used in the rule. If it did, any defendant wishing to escape liability could simply do whatever is necessary to "identify" more class members than his opponent could reasonably afford to notify individually. This cannot have been the intent of the drafters of the rule. Surely the rule cannot be interpreted to provide such an expeditious route to impunity for those who can afford the necessary identification process.

Even more difficult to accept is the pronouncement by the court of appeals that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce."[134] The class in *Eisen* is a relatively sophisticated group, and it is not unreasonable to assume that publication in appropriate financial journals and newspaper sections would reach a significant

---

[131] FED. R. CIV. P. 23(c)(2) (emphasis added).

[132] *See, e.g.*, Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied,* 398 U.S. 950 (1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

[133] *See, e.g.*, Cohn, *The New Federal Rules of Civil Procedure,* 54 GEO. L.J. 1204, 1214 (1966).

[134] 479 F.2d at 1017.

portion of the class.[135] Moreover, the fact that many class members, whose financial interest in the case is minimal, may not respond to such notice does not render publication either unacceptable or farcical. The Supreme Court has recognized that notice by publication is acceptable even though it may arguably be ineffective.[136] The court of appeals itself had, in an earlier appeal, indicated that notice by publication may be appropriate here,[137] and in another extremely large class action, the Second Circuit expressly approved notice by publication.[138] There would appear to be little doubt that the court's intractable rejection of notice by publication is unwarranted.

C. Cost of Notice

As to the allocation of costs of notice, the court of appeals declared that the district court does not have the discretionary power which it had claimed. Rejecting the district court's conclusion that it would not be fair to effectively terminate the plaintiff's potentially meritorious case by requiring him to bear all of the burden of costs of notice, the court of appeals specified that, in this type of case, the plaintiff must always be the one to pay.[139] The court of

---

[135]The SEC brief, which was quoted in Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), stated:

> In view of the existence both of a cohesive financial community, which includes broker-dealers who have obligations to their investor clients, and of publications exclusively concerned with matters of interest to that community, publication by itself might reasonably be expected to reach a significant portion of any class of public investors.

Id. at 501.

[136]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317.

[137]391 F.2d at 569-70.

[138]West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1090-91 (2d Cir.) *cert. denied*, 404 U.S. 871 (1971).

[139]479 F.2d at 1009. The court stated that its indication in the earlier appeal that the plaintiff must pay was not dictum. However, the court stated that other situations do exist, such as derivative stockholder's suits or actions

appeals did not elaborate much further on this aspect of its decision except to observe that if the defendants were required to pay for notice, they would be unable to recover whatever funds they had expended should they subsequently prevail upon the merits.[140]

To require the plaintiff to bear the expenses of providing notice may, in the end, prove a harsh but unavoidable conclusion. Thus, the problem with this aspect of the decision may not lie so much in the result reached as in the court's failure to fully explain the factors on both sides of this issue which the court saw as ultimately weighing in favor of burdening the plaintiff. The district court indicated that there are strong arguments on both sides of the issue of whether the court should exercise discretion in allocating costs to relieve one party and burden another.[141] The issue certainly cannot be dismissed out of hand,[142] and the court of appeals' opinion does not add much to a thoughtful resolution of the problem.

In many consumer class actions the court's willingness or ability to allocate the financial burden of giving notice will determine whether or not the plaintiff can proceed with his action.[143] The issue of who should pay for notice is not settled by rule 23, which says only that the court shall direct notice to be given.[144] Still, the general rule is that the plaintiff must bear this burden, for, after all, it is he who seeks, and presumably will obtain, the benefits of the class action procedure.[145] Indeed, to require a de-

---

involving public utility corporations, in which the circumstances may be such that the defendant may have to provide or pay for notice. *Id.* at 1009 n.5.

[140]*Id.* at 1008. The cost of notice required by the district court was $21,660 ($1,000 for individual notice, $20,660 for notice by publication). 52 F.R.D. at 267-68. Of this amount, the defendant was ordered to pay 90% or $19,494. 54 F.R.D. at 573. It was estimated that individual notice to the two million identifiable class members would have cost over $200,000. 52 F.R.D. at 260.

[141]52 F.R.D. at 269.

[142]*See* Comment, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 137, 156 (1969).

[143]*See* Dolgow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968).

[144]FED. R. CIV. P. 23(c)(2). The plaintiff's ability to give notice is not a prerequisite to maintaining a class action under 23(a) or (b). It may be argued, however, that a representative's capacity to pay for notice is a factor in his ability to adequately protect the interests of the class. *See id.* 23(a)(4).

[145]*See* Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98 (D. Colo. 1971); Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Indus.,

fendant to take the extraordinary step of paying for notice to the class opposing him raises the equitable uncertainties inherent in compelling a party to act against his own best interests.[146]

There are, however, recognized situations in which the courts can exercise the power to assign the burden of notice costs to the defendant, especially when the defendant is better able to bear the expense.[147] *Dolgow v. Anderson*[148] is typical of the first cases which have allocated costs in this manner.[149] Ordinarily, such cases have been stockholders' derivative actions, and the rationale for shifting the notice cost burden, as stated in *Dolgow,* was based upon three factors: the fiduciary duty owed to the plaintiffs by the corporate defendants, the interest of the defendants in res judicata, and the ability to bear the expense of notice.[150] Later, courts not only rejected the rigid rule that the plaintiff must always bear all notice costs, but went on to articulate a broader view of the various factors involved in the allocation determination. In *Berland v. Mack*[151] the court set forth the following relevant factors: the merits of the claim, the defendant's interests in res judicata, the number of named plaintiffs, the financial capacity of the named plaintiffs, the

---

317 F. Supp. 1022 (E.D. Pa. 1970); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55 (2d ed. 1969).

[146]One case, for example has stated that:

> On the other hand, where as here the plaintiffs are numerous, unidentified and have no relation to the defendant other than the purchase of a manufactured good, the imposition cost [*sic*] of notice on the defendant at an early stage of the case would be highly unfair and raise serious questions of due process.

Cusick v. N.V. Neterlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022, 1025 n.6 (E.D. Pa. 1970). *See also* Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* in *The Class Action—A Symposium,* 10 B.C. IND. & COM. L. REV. 557, 566 (1969).

[147]*See Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 938 (1958).

[148]43 F.R.D. 472 (E.D.N.Y. 1968). This case was a class action by stockholders against their corporation and its principal officers for manipulating stock prices and misleading investors.

[149]*See also* Bragalini v. Biblowitz, CCH FED. SEC. LAW RPTR. ¶ 92,537 (S.D.N.Y. 1969); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Miller v. Alexander Grant & Co., CCH FED. SEC. LAW RPTR. ¶ 93,287 (E.D.N.Y. 1971); Lamb v. United Sec. Life Co., CCH FED. SEC. LAW RPTR. ¶ 93,489 (S.D. Iowa 1972).

[150]43 F.R.D. at 498-500.

[151]48 F.R.D. 121 (S.D.N.Y. 1969).

size of the plaintiffs' claim relative to that of the entire class, the ability of the plaintiff or plaintiffs to pay for the initial notice, and the total cost of the required notice.[152] Finally, in some recent class actions, courts have required the defendants to pay either all or a significant portion of the costs of notice even though the cases were not stockholders' derivative suits.[153] In *Ostapowicz v. Johnson Bronze Co.*[154] the court stressed the plaintiff's inability to pay and the likelihood of his success upon the merits and concluded that the costs should be apportioned equally between the plaintiff and defendant.

Still, the allocation of costs of notice to a defendant in the normal adversarial situation is not easily justified. Some guidance may be found in an analogy to preliminary injunctions which can place significant burdens upon a defendant and thus also require the close scrutiny of the courts which are asked to apply them.[155] Similarly, a comparison might be drawn to discovery orders which can, and often do, subject defendants to substantial expenditures.[156] Perhaps ultimately it would be advisable to leave the question of notice cost allocation to the cautious discretion of the trial court judge who is obviously in the best position to consider the real hardships involved in each situation.[157] At any rate, it is clear

---

[152]*Id.* at 132. *See also* Feder v. Harrington, 52 F.R.D. 178, 184 (S.D.N.Y. 1970) (*Berland* tests applied); Korn v. Franchard Corp., 50 F.R.D. 57, 60-61 (S.D.N.Y. 1970) (referred to *Berland* tests but found expense of notice not sufficiently burdensome to relieve plaintiffs from defraying the costs).

[153]*See, e.g.*, Battle v. Municipal Housing Authority, 53 F.R.D. 423, 426 (S.D.N.Y. 1971) (class action under 23(b)(2) but requiring notice with expense of preparation and mailing to be borne by defendant).

[154]54 F.R.D. 465 (W.D. Pa. 1972). The *Ostapowicz* court cited Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971). 54 F.R.D. at 466.

[155]The court of appeals viewed the preliminary injunction as a provisional remedy utilized "to preserve the *status quo*" and rejected the district court's analogy. 479 F.2d at 1014. However, such a limited conception of the preliminary injunction has been criticized:

> The concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial.

Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1058 (1965).

[156]*Cf.* Trans World Airlines, Inc. v. Hughes Tool Co., 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973) (discovery costing several million dollars ordered).

[157]For example, the court might look for the significance of such ironies as a defendant who gratuitously offers to pay the entire cost of generating

that this issue of cost allocation needs further examination and certainly should not be dismissed without complete judicial consideration.[158]

D. Preliminary Hearing on the Merits

As discussed earlier, the district court ordered and held a preliminary hearing on the merits to better determine whether shifting a portion of the costs of notice to the defendant would be justified.[159] The court of appeals rejected such a hearing because it is "not authorized" by the rule and because the district court had no jurisdiction "to pass on the merits."[160] This holding is also vulnerable to several compelling counterarguments. First, rule 23 does not, at any point, specifically preclude such a hearing; and, if "authorization" by the rule is indeed necessary, such authority might be found under 23(d).[161] It is submitted, however, that if nothing in the rule would prevent it, and such a hearing is otherwise lawful and appropriate, then any lack of an explicit and specific requirement or express authorization in the rule

---

a list of thousands or millions of "identifiable" class members, yet who balks at the "burdensome" cost of providing notice—especially when the former cost is equal to or greater than the latter.

[158]Note also that the plaintiff in *Eisen* argued that to require a party to pay for a notice which he simply cannot afford denies him access to relief and thus may raise constitutional questions under Boddie v. Connecticut, 401 U.S. 371 (1971). Brief for Appellee at 20. The *Boddie* case involved the application of a state's cost requirements to indigent welfare recipients seeking a divorce. The Court did observe in that case that, "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." 401 U.S. at 380.

[159]52 F.R.D. at 270-72; 54 F.R.D. at 565.

[160]479 F.2d at 1015-16.

[161]FED. R. CIV. P. 23(d). This section of the rule gives the court a broad authority to make various orders in conducting class actions. In part, the rule provides, "In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (3) imposing conditions on the representative parties. . . ." *Id. See* Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968); Advisory Comm. Note, 39 F.R.D. at 106-07. The concluding sentence of this section of the rule provides that these "orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time." FED. R. CIV. P. 23(d). Rule 16 provides that "the court may in its discretion . . . direct the attorney for the parties to appear before it for a conference to consider . . . such . . . matters as may aid in the disposition of the action." FED. R. CIV. P. 16(a). Thus, arguably, these rules provide sufficient "authority" for the preliminary hearing conducted by the trial court.

should not be interpreted as disallowing a procedure which would aid the court in making necessary collateral determinations.

Most notably, however, in rejecting the district court's preliminary hearing on the merits, the court of appeals relied upon cases which are clearly distinguishable from the instant case. Each of the those cases was concerned with use of the preliminary hearing for the initial class action determination and not with the subsequent question of who should bear the costs of notice once the propriety of the class action has been established.[162] The reasons given by those courts for rejecting the preliminary hearings in the situations before them have little or no application here. In determining whether a case may be maintained as a class action, the court must see whether the prerequisites of rule 23(a) and (b)(3) are met.[163] The cases cited by the court of appeals correctly argue that the rule 23 prerequisites do not require that the plaintiff demonstrate the merit of his claim before his case can be considered "maintainable" as a class action—so long as the court is convinced that the complaint is not frivolous.[164] Thus, those cases recognized that a hearing on the merits, if used as a predeterminant to proceeding under rule 23, would be an additional and unnecessary barrier to the maintenance of class actions.[165] Since the courts can determine whether the rule's prerequisites

---

[162]Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971); Kahan v. Rosentiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971); Fogel v. Wolfgang, 47 F.R.D. 213 (S.D.N.Y. 1969); Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D.N.Y. 1969); Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968). The only case cited by the court of appeals which might lend support to its rejection of the *Eisen* district court's use of the preliminary hearing is Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969). The *Berland* court stated that such a hearing is "illusory." *Id.* at 132. However, it must be noted that first on the *Berland* court's list of factors to be considered in allocating the cost of notice is "the apparent merit or lack of merit in the claim." *Id.*

[163]*See* notes 23, 25 *supra* & accompanying text.

[164]3B J. Moore, Federal Practice ¶ 23.45[3] (2d ed. 1969). *See, e.g.*, Katz v. Carte Blanche Corp., 52 F.R.D. 510, 513-14 (W.D. Pa. 1971). Similarly, some preliminary showing of a defendant's freedom from wrongdoing is "substantially irrelevant" in determining the maintainability of a class action. Fogel v. Wolfgang, 47 F.R.D. 213, 218 (S.D.N.Y. 1969).

[165]*But see* Milberg v. Western Pac. R.R., 51 F.R.D. 280 (S.D.N.Y. 1970), *appeal dismissed*, 443 F.2d 1301 (2d Cir. 1971); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

have been met without resort to a preliminary hearing on the merits, the use of such a procedural devise would be "redundant."[166]

The district court in *Eisen* applied the preliminary hearing on the merits in an entirely different context.[167] In *Eisen,* the district court had already determined that the case could be maintained as a class action. The decision to hold a preliminary hearing on the merits had absolutely nothing to do with determining the propriety of the class action. The hearing used by Judge Tyler was strictly limited to its stated purpose: "the allocation of the cost of notice."[168] Such a hearing is not precluded by the reasoning of the cases cited by the court of appeals.

The court of appeals may have been correct in stating that the district court did not, at this time, have "jurisdiction to pass on the merits of the case. . . ."[169] But as to the district court's preliminary hearing, that observation is irrelevant. The fact is, the district court *did not* "pass" on the merits of this case. The district court looked very closely at the merits to make an informed determination as to the "likelihoods" involved, but did not pass on the merits.[170]

Other aspects of the Second Circuit's rejection of this preliminary hearing are similarly questionable. The court of appeals said that the findings of such a hearing are arrived at without appropriate safeguards and are extremely, and probably irre-

---

[166]Green v. Wolf Corp., 406 F.2d 291, 301-02 n.15 (2d Cir. 1968).

[167]In fact, at least two of the cases cited by the court of appeals expressly recognized the distinction between a preliminary hearing on the merits used to determine whether a case is maintainable as a class action and such a hearing used as a prelude to allocating the cost of notice. The principal case relied upon by the court of appeals was Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971), which stated:

> those cases which approve the Dolgow procedure often do so *in an entirely different context,* i.e. a hearing before assessing costs of notice.

Id. at 429 n.5 (emphasis added). *See also* Katz v. Carte Blanche Corp., 52 F.R.D. 510, 513 (W.D. Pa. 1971). A later opinion in the *Katz* case may be cited for support of a preliminary hearing as used in the context of a preliminary step to an apportionment of costs of notice. *See* Katz v. Carte Blance Corp., 53 F.R.D. 539 (W.D. Pa. 1971), in which the court, in concluding that the plaintiff must bear the initial cost of notice, observed that "[a]s a result of an essentially evidentiary hearing, substantial evidence as to the merits presently appears in the records." *Id.* at 546 n.15.

[168]54 F.R.D. at 567.

[169]479 F.2d at 1016.

[170]*See* 54 F.R.D. at 571, in which the district court stated, "Plaintiff and the class have established that they *may likely* carry their burden of producing

parably, prejudicial.[171] But the court of appeals did not allege that the preliminary hearing in this particular case was actually unfair. The court simply made the statement that "in most cases" such hearings will be prejudical.[172] No reason was given as to why it should be assumed that the district court is incapable of holding a preliminary hearing on the merits which conforms to constitutional standards of due process.[173] To say that such a hearing is necessarily prejudicial is to say that the district court is incapable of maintaining a consistently objective viewpoint through to the completion of the trial on the merits.[174]

V. CONCLUSIONS

If the *Eisen* case stands, its impact upon consumer class actions will be devastating. Under this most recent *Eisen* opinion, the consumer plaintiff simply cannot pursue the class action device —he is closed out from every angle. If, for example, he can afford to pay the formidable cost of even the most minimal notice requirements, he will surely be unable to pay for notice to every individual "identifiable" member of his massive class. If the plaintiff can somehow clear the notice hurdle (if, for example, not many of his class are "identifiable"), then the quietus of his class action will be the inaccessibility of the fluid class recovery method of distributing damages. The Second Circuit's latest *Eisen* opinion has appropriately been labeled the "death knell" of consumer and environmental class actions.[175]

---

evidence that the defendants fixed prices." *Id.* (emphasis added). *See also* 54 F.R.D. at 573 stating, "Plaintiff *has excellent evidence* that the Exchange has not satisfied [its regulatory] duties." *Id.* (emphasis added).

[171]479 F.2d at 1015.

[172]*Id.*

[173]*Cf.* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[174]The express purpose of the hearing held in *Eisen* was to aid the court in its determination of allocating costs of notice. *See* 54 F.R.D. at 566. The court stated quite clearly that its findings and conclusions were binding "only" for that purpose, and further, that these findings would "not be considered to prejudice any party's right to introduce more evidence and proffer further argument when the merits are reached for final determination." *Id.* at 567 (emphasis added). More problems arise, however, when the ultimate trial on the merits is before a jury. Serious steps would have to be taken to help insure that the jury would not be prejudiced by the results of prior hearing on the merits.

[175]479 F.2d at 1026 (Oakes, J., dissenting).

But the Second Circuit has reached a doubtful result. This opinion seems utterly inconsistent with the purpose and necessary flexibility of amended rule 23. Even the *Eisen* court would agree that one of the primary functions of a class action is the vindication of small claims which have legally actionable significance only if taken as a group.[176] Yet, in this most recent opinion, the court places a disturbing emphasis upon the smallness of the individual claims involved.[177] The precept that rule 23 must be given a liberal interpretation has been affirmed so many times that it hardly needs repeating.[178] The desire to protect "many small investors" was part of the philosophy behind the revision of rule 23,[179] and the new rule was designed to provide a "thoroughly flexible remedy."[180] This most recent *Eisen* opinion does not square with any of these guidelines.

The class suit was an invention of equity[181] which resulted from the "practical necessity" of allowing large groups with common interests to enforce their rights.[182] In a case of this nature, the fluid class recovery and the notice system outlined by the district court present the best pratical method of benefiting the class. The damage question in class actions must be approached pragmatically, and the remedy must provide at least substantial justice.[183] Practicality must not outweigh constitutional rights, but it must be remembered that class actions—and particularly large consumer class actions—are fundamentally distinct from ordinary adversary proceedings. Procedures which are fundamental to normal litigation involving a single plaintiff and defendant may

---

[176]*See* 391 F.2d at 563, *citing* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). *See also* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, in *The Class Action —A Symposium*, 10 B.C. IND. & COM. L. REV. 501 (1969).

[177]*See, e.g.*, 479 F.2d at 1010, 1017.

[178]*See, e.g.*, Schneider v. Electric Auto-Lite Co., 456 F.2d 366, 370 (6th Cir. 1972); Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 768 (8th Cir. 1971); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); 391 F.2d at 563.

[179]Korn v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y. 1970).

[180]391 F.2d at 560.

[181]Hansberry v. Lee, 311 U.S. 32, 41 (1940).

[182]Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

[183]Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 587 (E.D.N.Y. 1971).

be unnecessary or subject to appropriate modification in some rule 23(b)(3) class actions.[184] If an unreasonably rigid notice requirement stops the expansion of class actions, then progress toward protection of the public's rights will not have advanced much beyond the old rule's nemesis of required intervention. In addition, it must be pointed out that there is no preordained requirement that the plaintiff must always pay the cost of notice in these cases, and a preliminary hearing on the merits to help the court make such a cost allocation determination may be appropriate, necessary, and authorized by rule 23.

The opponents of large class actions under rule 23 have been vocal and effective.[185] These critics see such suits as tools of harassment used to coerce defendants into large settlements which benefit only the lawyers who handle the litigation. Consumer class actions are characterized as unmanageable monstrosities which are flooding the already overcrowded court dockets.[186] The court of appeals was obviously influenced by such arguments, for it adopted the phrase describing these suits as "legalized blackmail"[187] and compared these class actions to "the old-fashioned strike suits made famous a generation or two ago. . . ."[188] But a comparison of rule 23 class actions to strike suits is inaccurate. A strike suit, which might be brought upon a frivolous claim, is motivated by the desire for a coerced settlement.[189] Rule 23 has safeguards against such practices. First, the court can exercise

---

[184]*See* Miller, *Problems in Administering Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 507 (1972).

[185]*See, e.g.*, Handler, *Some Shifts from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971); Handler, *Twenty-fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 34-42 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).

[186]*But see* Weinstein, *The Class Action Is Not Abusive*, 167 N.Y.L.J. 1 (May 1, 1972) & 1 (May 2, 1972); *Hearings on Consumer Protection Act of 1970, S. 3201, Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 212-17 (1970) (statement of Ralph Nader).

[187]479 F.2d at 1019, *citing* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

[188]*Id.*

[189]*See* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974-75 (1971).

its discretionary power to refuse to allow a frivolous class action.[190] Secondly, the abuse of the "secret settlements" has been carefully guarded against in subdivisions (d)(2) and (e) of rule 23. Under 23(d)(2), notice to class members of any step in the action can be ordered, and 23(e) requires court approval of any settlement and notice to all class members of dismissal or compromise.[191]

The compelling reasons for sustaining the progress of rule 23 in this area must be weighed against the arguments of those who oppose massive class actions. Foremost of these reasons is the absence of a comparable, available remedy which offers the flexibility and results attainable under rule 23. The Court of Appeals for the Second Circuit had recognized earlier that repayment of wrongfully obtained profits could not be obtained through any public administrative agency and that this "responsibility *must* ultimately rest on the judicial system."[192] Now the court stresses that the SEC has exclusive jurisdiction to regulate rates.[193] However, as other courts have pointed out, the SEC does not have the primary responsibility for enforcement of competition.[194] The SEC lacks standing to commence antitrust suits,[195] and it certainly cannot award damages or bring a class action.[196] Clearly, there is a strong public policy in favor of private antitrust litigation,[197] and the injustice of allowing the wrongdoer to retain illegal profits and of denying compensation to the aggrieved parties is obvious.

---

[190] *See* FED. R. CIV. P. 23(a), (b).

[191] *See, e.g.*, Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971) (requiring notice to class of proposed settlement). It should also be noted that the Federal Rules of Civil Procedure provide additional protection for defendants against vexatious litigation, *See* FED. R. CIV. P. 12 (motion to dismiss); id. 56 (motion for summary judgment); Miller v. Mackey Int'l, Inc., 452 F.2d 424, 428-29 (5th Cir. 1971).

[192] 391 F.2d at 567 (emphasis added); *see* Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768, 785 (1965).

[193] 479 F.2d at 1011.

[194] Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 272 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

[195] *See* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

[196] 54 F.R.D. at 573. The district court pointed out that "the Commission has done all that it could do by requiring the Exchange to establish the Rule which lowered the differential in 1966." *Id.*

[197] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131 (1969); United States v. Borden Co., 347 U.S. 514, 518 (1954); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

The private class action is the *only* means of providing repayment of illegal profits when those profits result from small individual wrongs perpetrated on the massive scale made possible by a technological, industrial society.[198] Defendants characterize such repayment as "confiscation" and judicial creation of a "pot of gold."[199] But if consumer fraud or price fixing is proven at trial, would it be preferable to leave the illegally obtained "pot of gold" in the corporate coffers?[200] Without the private consumer class action there will be little to deter those who would reap huge profits by treading a "little" upon the rights of many. Public faith in our judicial system requires that a forum be provided for the adjudication of such violations. The historic role of the courts has been to find some means of compensating when a wrong has been done[201] and, in so doing, to avoid letting lawbreakers retain the fruits of their illegality.[202]

No doubt the critics are correct in claiming that these suits have considerable *in terrorem* effect,[203] but arguably that aspect of the consumer class action provides a necessary deterrent—an important supplement to law enforcement.[204] If these private actions can be maintained, they will provide a significant deterrent to conduct proscribed by federal laws.[205] The court of appeals has argued that Congress should create "some public body" to handle these problems;[206] however, since private actions already play such

---

[198]*See* Dolgow v. Anderson, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968).

[199]*See, e.g.*, Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 383-84 (1972).

[200]*See In Re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 287 (S.D.N.Y. 1971).

[201]Biglo v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). The Supreme Court declared that "[t]he constant tendency of the courts is to find some way to which damages can be awarded where a wrong has been done." *Id.* at 265, *quoting from* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931).

[202]*See* Hanover Shoe Co. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

[203]*See, e.g.*, 479 F.2d at 1019.

[204]*See* Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1261 (1970).

[205]*See* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 508 (1972).

[206]479 F.2d at 1019.

an important role in the legislative scheme of federal antitrust and securities laws,[207] Congress has already acted. Congressional policy clearly favors private litigation for effective enforcement of antitrust laws.[208] Again deferring to Congress, the opponents of consumer class actions make the argument that the recoveries involved are actually penalties, and only Congress should determine how such money is best spent.[209] However, under the doctrine of *cy pres,* the courts have long been recognized as being capable of similar determinations.[210]

All this is not to say that every consumer class action must be allowed. Each case will necessarily turn on its own facts,[211] and certainly there will be some cases which are not manageable. But the *Eisen* decision would prohibit virtually *all* large class actions. Instead, because of the vital public interest involved in class actions of this type, dismissal of an otherwise meritorious suit for management reasons should be the exception rather than the rule.[212] Because of policy arguments favoring class actions, doubts should be resolved in favor of their use,[213] and, when the determination is close, courts should err in favor of the class suit.[214] It should be noted that the rule itself provides some means which the courts can utilize to avoid dismissal of class actions as unmanageable.[215] One such alternative, which was completely ignored by the *Eisen* court, is the possibility that the class could be divided

---

[207]*See* Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

[208]"Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Minnesota Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 318 (1965).

[209]*See* 479 F.2d at 1019.

[210]*See* note 101 *supra. See also* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3),* 54 F.R.D. 501, 510 (1972).

[211]City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971).

[212]*See* MANUAL FOR COMPLEX LITIGATION 28 n.36 (West Pub. 1973).

[213]Katz v. Carte Blanche Corp., 41 U.S.L.W. 2661 (3d Cir. May 22, 1973).

[214]Esplin v. Hirschi, 402 F.2d (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

[215]*See, e.g.,* FED. R. CIV. P. 23(c)(4) which provides for the restructuring of complex cases by dividing the class into subclasses.

into subclasses for easier management or even test litigation.[216]

The management of these cases presents an enormous challenge, demanding an imaginative, yet considered, response from legal practitioners and the courts.[217] In some cases, the difficulties will be overwhelming,[218] but this result cannot be the foregone conclusion which the Second Circuit has now declared. Injured parties should feel that they can rely upon our judicial system. Indeed, in cases such as this, those who have been injured can turn to no other viable alternative. Judge Oakes, who dissented from a denial of rehearing in *Eisen*, referred to the court's suggestion that the matter could be handled by some vague, future Congressional remedy as "an abdication of judicial responsibility."[219] There may be an understandable reluctance to take on the burden of these cases, but this indisposition should not result from the supposed reason that the courts do not have the capability or skill to handle

---

[216]*Id. See also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790 (1972). The court in Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), appropriately summed up the consideration as follows:

> In sum, we hold that this is a proper case for a class action. We recommend to the district court that it make use of the freedom afforded it by Rule 23 to manage the litigation efficiently and fairly, including the creation of any necessary subclasses. We recognize that this might, in cases such as this, place additional burdens on judges but the alternatives are either no recourse for thousands of stockholders to whom the courthouse would thus be out of bounds or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.

Id. at 301.

[217]The freedom to allow these class actions does leave much to the discretion of the trial judge. Fears of any abuses which might result may, however, be considerably allayed if orders permitting suits to proceed as class actions are made appealable, as the Second Circuit has indicated such orders should be. *See* 479 F.2d at 1007 n.1; note 20 *supra.*

[218]Although dismissal should be the exception, the following cases have rejected class actions at least partly on the basis of manageability problems. Schaffner v. Chemical Bank, 339 F. Supp. 329, 330 (S.D.N.Y. 1972) (rejecting class of "all persons and institutions who are or have been beneficiaries of any trust or trusts of which defendant is trustee and for whose account defendant executes securities transactions"); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (rejecting class of all nongovernmental gasoline purchasers in Delaware, Pennsylvania, and New Jersey); Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972) (rejecting class of all gasoline purchasers in Hawaii).

[219]479 F.2d at 1024 (Oakes, J., dissenting).

such complex problems.[220] The courts do have the expertise—if they lack the necessary funds or personnel, then these should be expanded to meet the demands being made upon the judiciary by an expanding society.

The most striking flaw in the arguments of the critics of large class actions is the failure to suggest an available alternative remedy.[221] In denying rehearing of the *Eisen* case, the judges of the Second Circuit have stressed the likelihood that the Supreme Court will hear this case under its certiorari jurisdiction.[222] But if the *Eisen* decision stands as it is now, the consumer has lost this hoped-for remedy against monopolies and others whose technological trangressions assume proportions large enough to affect millions. For such consumers, the procedural device of massive class actions under rule 23 will be dead. If that is the case, the search for a viable alternative remedy must immediately be given our most urgent national attention.

DAVID R. KELLY

---

[220]The handling of the *Drug Cases* clearly indicates that the courts have the capability and expertise to deal with class action litigation of this kind. *See Hearings on the Consumer Protection Act of 1970, S. 3201, Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 182-83 (1970) (statement of Judge Alfred P. Murrah).

[221]The court of appeals in *Eisen* has suggested that the injunctive relief should be sought, but this falls short of what is needed. *See* 479 F.2d at 1020. The wrongdoer will not be deterred when he knows that, even if his illegal activity might be enjoined, he can, in any event, keep whatever ill-gotten profits he has made. In addition, an injunction alone provides no financial compensation to aggrieved parties.

[222]*See* note 94 *supra*.

PRODUCTS LIABILITY IN INDIANA: CAN THE BYSTANDER RECOVER?

I. INTRODUCTION

Recently a federal court in Indiana was faced with the issue of bystander recovery in a products liability case.[1] The non-purchaser plaintiff had been injured when a piece of metal, thrown from a power lawnmower, struck him. The plaintiff alleged that the manufacturer's lawnmower was defective in that a safety deflector plate was missing and maintained that the manufacturer was strictly liable for his injuries. The defendant moved to dismiss the suit for lack of privity between him and the plaintiff.

The court, bound by Indiana law,[2] could find no Indiana precedent allowing such recovery. Section 402A[3] of the *Restatement (Second) of Torts,* which imposes strict liability on a manufacturer of defective products which injure a user or purchaser, takes no position on the question of bystander recovery.[4] Nevertheless, the federal court concluded that the same policy arguments which protect the purchaser should also protect all innocent third parties who are injured by defective products. The motion to dismiss was denied.

---

[1]Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969).

[2]Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Jurisdiction in *Sills* was invoked on the basis of diversity of citizenship.

[3]RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[4]*Id.* Comment *m.*

In the products liability area, consumer protection has seen great expansion in recent years. The doctrine of caveat emptor has generally been abandoned in favor of a strong public policy calling for safe and merchantable items in the stream of commerce. Increasing litigation marks a trend toward holding a manufacturer of defective goods strictly accountable for any injury that the goods cause. The injured user may pursue the manufacturer through three theories—negligence, breach of warranty, or strict liability in tort. The purpose of this discussion is to focus upon the mercantile defendant's liability when one other than the user is injured by defective products.

II. Escape from the Privity Nemesis

Several decades ago, an English court disdainfully rejected the argument that a maker of chattels could be held liable to someone other than his immediate buyer for personal injuries caused by defective goods.[5] Winterbottom, a coach passenger, was injured when a defective wheel collapsed causing the coach to overturn. The court foresaw impending doom if the law suit were allowed for "every passenger, or even any person passing along the road, who was [likewise injured], might bring a similar action."[6]

Thus, *Winterbottom* was interpreted to mean that no action in contract or in tort would lie when "privity" was lacking.[7] The privity rule was supported by the flimsy rationale that the manufacturer of a product could not be held to anticipate the use of that product by nonpurchasers. Therefore, the manufacturer was insulated from liability when an unforeseen user was injured.[8]

The privity rule arrived in Indiana in 1883.[9] Should the privity bar be lifted, the courts feared that an endless stream of litigation would ensue. Recovery was consistently denied whenever the privity chain was broken, often leaving the nonpurchaser plaintiff without an effective remedy. One shocking result of stare decisis is reflected in an early Indiana case[10] denying recovery when a brick wall fell on the plaintiff's daughter and killed her. Because the

---

[5]Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

[6]*Id.* at 405.

[7]Earl v. Lubbock, [1905] 1 K.B. 253.

[8]*Id.*

[9]State *ex rel.* Travelers Ins. Co. v. Harris, 89 Ind. 363 (1883). *See also* Hoosier Stone Co. v. Louisville, N.A. & C. Ry., 131 Ind. 575, 31 N.E. 365 (1892).

[10]Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896).

defendant-contractor had completed construction and ownership had passed to the nonparty buyer, the contractor was insulated from liability for the admittedly defective construction. He owed no duty to the pedestrian who happened to be on the sidewalk when the wall collapsed.

The early common law decisions denying recovery when privity was lacking have received just criticism.[11] However, these cases should be examined in light of their historical setting. The common law manufacturer was not in a better bargaining position than his buyer. Buyers and manufacturers dealt on a face-to-face basis within the community. The manufacturer depended heavily upon his good reputation, and fair dealing insured future business from his neighbors. To impose liability upon him was considered a hardship in that the loss could not be passed on to consumers generally.

As early as 1910, the Indiana courts began to formulate exceptions in order to avoid the harsh inequities of the privity rule.[12] Misrepresentation by the seller took the case out of the *Winterbottom* rule.[13] In addition, following the lead of a New York case,[14] the Indiana Appellate Court held that privity did not apply to the manufacture of inherently dangerous products.[15] Even so, Justice Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*[16] had no immediate effect in Indiana. Cardozo's unimpeachable reasoning that any product can be hazardous if defectively made was completely ignored by the Indiana Supreme Court when *Winterbottom* was reaffirmed as law in 1919.[17] Twenty years passed before *MacPherson* was cited with approval by Indiana courts.[18]

---

[11]*See* Stewart, *Products Liability: Privity of Contract—Birth, Life, and Death in Indiana*, 9 RES GESTAE, Feb. 1965, at 11.

[12]Laudeman v. Russell & Co., 46 Ind. App. 32, 91 N.E. 822 (1910).

[13]*Id.*

[14]Thomas v. Winchester, 6 N.Y. 397 (1852) (sale of poison).

[15]Laudeman v. Russell & Co., 46 Ind. App. 32, 91 N.E. 822 (1910). The dissenting opinion presents a good discussion of the difficulties of classifying a product as an inherently dangerous object.

[16]217 N.Y. 382, 111 N.E. 1050 (1916). Cardozo reasoned that a manufacturer was under a duty to everyone to make his product with care or not to market it at all. This duty accrued upon purchase by the consumer.

[17]Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919). Plaintiff's decedent was killed when a county bridge collapsed. The court held that at the moment the county accepted the structure from the defendant-contractor, privity was broken as to the plaintiff. Recovery was denied.

[18]Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938). *See also* Coca-Cola Bottling Works, Inc. v. Williams, 111 Ind. App. 502, 37 N.E.2d 702 (1941).

Privity in negligence actions was not struck down until 1964 in *J. I. Case Co. v. Sandefur*.[19] *Sandefur* was a negligence action against a remote manufacturer brought by a nonpurchaser plaintiff. Voluminous precedent would not sanction such a law suit, but the supreme court rejected the defense of lack of privity and expressly adopted *MacPherson* as Indiana law. In a well reasoned opinion, the court held that a manufacturer can be held liable to *any* person for marketing a product that can reasonably be foreseen to cause injury if defectively made. By striking down privity as a necessary element of the negligence action, *Sandefur* put Indiana law more in line with the atmosphere of today's marketplace. The manufacturer is not aware of which individuals will purchase or use his product. It is for this reason that he should be held to foresee that any person could be injured by his negligence.

Unfortunately, the death of privity in negligence has not destroyed the *Winterbottom* doctrine under all theories of liability. When the bystander plaintiff is seeking to recover under a contract action based upon breach of warranty, his remedy is governed by the Uniform Commercial Code.[20] Privity remains a viable concept under the Code. Under Indiana law, the privity of contract bar is lifted only so far as to encompass members of the purchaser's household or his guests who may be injured by breach of warranty.[21]

Notwithstanding the restrictive statutory language, early Indiana case law indicated that an action for breach of implied warranty might sound in tort.[22] Later the Indiana Supreme Court expressly adopted this position in *Wright Bachman, Inc. v. Hodnett*.[23] In *Hodnett* the court held that an action for breach of

---

[19]245 Ind. 213, 197 N.E.2d 519 (1964).

[20]IND. CODE § 26-1-1-101 *et seq.* (1971) [hereinafter cited as UCC].

[21]UCC § 2-318. Official Comment 2 of UCC § 2-313 states that "the warranty sections . . . are not designed to disturb those parallel lines of case law growth which have recognized that warranties need not be confined to sales contract or to the direct parties to such a contract." But the persuasion of this authority may be somewhat limited by the fact that Indiana did not adopt the Official Comments when the statute was enacted.

[22]Heise v. Gillette, 83 Ind. App. 551, 149 N.E. 182 (1925). Plaintiff was poisoned by a rancid chicken sandwich and sought recovery against the seller. The defendant contended that to recover the plaintiff must show negligence. The court rejected defendant's argument and held that in the sale of food for human consumption, an implied warranty of fitness arose which ran in favor of the buyer.

[23]235 Ind. 307, 133 N.E.2d 713 (1956). This was an action for personal injuries brought against a ladder manufacturer. The case represents a de-

implied warranty may sound in tort or contract as determined by the pleadings.

The federal courts sitting in Indiana have seized *Hodnett* and have interpreted it to stand for the proposition that privity is not a requirement when the plaintiff grounds his warranty action in tort.[24] This pronouncement has broad ramifications. If the plaintiff is basing his breach of warranty suit on a tort theory, the necessity for showing a "sale" of the product disappears. If a product carries with it an implied warranty of fitness imposed by law,[25] then that warranty runs in favor of those who come in contact with the item, regardless of whether they purchased it. Once the requirement of a sale within the meaning of the Uniform Commercial Code is obviated, privity no longer presents any conceptual problem to the innocent bystander. His standing to sue is based upon a tort theory, and his connection with the manufacturer is an implied warranty running with the goods. The policy considerations postulated in *Sandefur* should apply to him as they do to consumers generally.

It has been held that the relationship of employer-buyer establishes a sufficient privity connection for an employee to recover under a theory of breach of implied warranty—the court assumed,

---

parture from the then accepted theory that warranty actions must sound in contract. The plaintiff recovered under a tort theory, but the court regarded privity as an essential element.

[24]Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965) (truck accident caused by a defective tire manufactured by defendant—privity not required).

[25]

> There seems to be some confusion in understanding the nature of implied warranty liability. In the first place, concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases. Proof of negligence is unnecessary to liability for breach of implied warranty and lack of it is immaterial to defense thereof. Since the warranty is *implied*, either in fact or in law, no express representations or agreements by the manufacturer are needed. Implied warranty recovery is based upon two factors: (a) the product or article in question has been transferred from the manufacturer's possession while in a "defective" state, more specifically, the product fails either to be "reasonably fit for the particular purpose intended" or of "merchantable quality," as these two terms, separate but often overlapping, are defined by law; and (b) as a result of being "defective," the product causes personal injury or property damage.

Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 922 (D.C. Mun. App. 1962).

"without deciding, that Indiana adheres to the privity rule."[26] It is arguable that an employee is encompassed by the employer's privity in this situation, but if privity has no application to this action it seems a short step to include the bystander as a legitimate plaintiff.

Recovery for the bystander has been further reinforced by *Filler v. Rayex Corp.*[27] Plaintiff, a high school baseball player, sued a maufacturer who advertised his product as "baseball sunglasses." The lenses shattered when struck by a baseball and severly injured the player's eyes. The flip-down glasses had been purchased by the coach to be used by the team members. In sustaining the plaintiff's recovery under a warranty theory, the court drew an appropriate analogy to the injured employee situation in other cases. An equally persuasive analogy can be drawn in favor of the injured bystander.

When liability is based upon warranties arising out of the sale of goods under contract theory, privity has retained vitality.[28] Here the rule has been justified on the theory that a warranty is a benefit of the bargain intended to run only to the purchaser who paid for this protection. Thus, the manufacturer or seller owes no duty to an outsider who has not bargained for the benefit. This position may have been sustainable prior to the industrial age, but today consumers are no longer on an equal footing with industry. Such an idea of "personal warranties" is inconsistent with our modern commercial trade practices. Marketing methods give the consumer meager opportunity to dicker for terms of a guarantee. Except in rare cases, manufacturers do not know the individuals with whom their retailers will deal. More consistent with today's business atmosphere is the policy argument that each member of society should reap the rewards of warranty protection. The person most able to protect against defective products is the manufacturer, and his warranties should be given to consumers generally and not to customers individually.

III. Strict Liability in Tort

Whereas warranty liability arises out of concepts applicable to commercial transactions, strict tort liability is imposed by law almost solely for reasons of public policy. It is under a theory of

---

[26]Hart v. Goodyear Tire & Rubber Co., 214 F. Supp. 817, 820 (N.D. Ind. 1963).

[27]435 F.2d 336 (7th Cir. 1970).

[28]Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970).

strict liability that an injured bystander is most likely to succeed against a manufacturer of defective products. This theory breaks the confines of negligence and warranty by escaping the privity nemesis.

The injured bystander faces a true dichotomy with his law suit in Indiana courts. The Indiana Supreme Court has not spoken with approval of the strict liability theory, yet the federal courts, sitting in Indiana, have applauded the concept and have expanded it to broad application.

The doctrine arrived in Indiana via *Greeno v. Clark Equipment Co.*[29] An employee brought an action against a forklift tractor manufacturer for injuries sustained while operating the machine. The forklift had been leased by the plaintiff's employer from a leasing company which was not a party to the suit. The defendant moved to dismiss the complaint which was based on a strict liability theory.

The *Greeno* court preliminarily decided that the complaint did meet the requirements of section 402A. The real question was whether the complaint met the requirements of the substantive law of the state. The court cited *Sandefur* for the proposition that a trend was developing in Indiana to permit a strict liability action because *Sandefur* allowed recovery from a remote manufacturer

---

[29]237 F. Supp. 427 (N.D. Ind. 1965). The first state jurisdiction to accept the strict liability theory was California in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The case is often cited for the cogent analysis of Justice Traynor:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being . . . . Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

59 Cal. 2d at 63-64, 377 P.2d at 900, 27 Cal. Rptr. at 701.

based upon the policy of consumer protection.[30] Therefore, the court accepted the *Restatement* position as Indiana law.[31] Both the federal district courts and the Seventh Circuit Court of Appeals have applied *Greeno* as Indiana law to products liability cases.[32]

Under a strict liability theory, negligence on the part of the user is not a defense for the manufacturer.[33] Privity of contract is not a bar because liability is not imposed through a sale of the goods, but is imposed for reasons of public policy.

The first state court in Indiana to apply the theory of strict liability was the court of appeals in *Cornette v. Searjeant Metal Products, Inc.*[34] The court expressly adopted section 402A as Indiana law and cited with apparent approval the federal cases applying the rule. However, bystander recovery was not an issue in *Cornette*, and the opinion contained disturbing dictum that the *Restatement* section "should be strictly construed and narrowly applied."[35] But it may be significant that the court declined the opportunity to overrule the federal cases which had preceded *Cornette*.

In *Perfection Paint & Color Co. v. Konduris*[36] the theory of strict liability was broadened. In this case the plaintiff's decedent had been burned when paint lacquer, furnished at no charge by the defendant, caught fire. The defendant contended that since there was no sale of a product, strict liability did not apply. The court answered that strict liability is imposed not because of a sale of goods, but because of the introduction of defective articles into the stream of commerce. The critical inquiry is whether a defective product is put on the market.

---

[30]It is interesting to note that three years after the *Greeno* decision the Indiana Court of Appeals refused to accept such a broad reading of *Sandefur*. Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968).

[31]The court in *Greeno* admitted that the "precise question involved has never been presented to Indiana courts, and state guidelines are not easily ascertainable in this rapidly developing field of the law . . . ." 237 F. Supp. at 428.

[32]Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969); Illnicki v. Montgomery Ward Co., 371 F.2d 195 (7th Cir. 1966); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969).

[33]Downey v. Moore's Time-Saving Equip. Co., 432 F.2d 1088 (7th Cir. 1970) (recovery denied—misuse of the product).

[34]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[35]*Id.* at 53, 258 N.E.2d at 657.

[36]147 Ind. App. 106, 258 N.E.2d 681 (1970).

Both *Cornette* and *Perfection Paint* reflect the Indiana trend, first noted by the *Greeno* court, toward protecting innocent persons who are injured by defective goods. The real question is whether this trend encompasses the bystander. It would certainly seem that he falls within the class of persons to be protected upon policy grounds. Perhaps an even stronger argument can be made in favor of the bystander's recovery in that the purchaser normally has an opportunity to inspect before he buys and to reject goods with an apparent defect. The innocent bystander has no such protection. Therefore, this is further justification to sanction the injured third party's recovery.[37]

Strict liability as a theory of recovery in products liability cases has found wide acceptance throughout the country.[38] In those jurisdictions subscribing to the theory, the bystander has met uni-

---

[37]As stated by the Supreme Court of California in Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969):

> Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured . . . and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

Id. at 586, 451 P.2d at 89, 75 Cal. Rptr. at 658.

[38]The first state to face bystander recovery was Michigan in Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965). Plaintiff was injured when his brother fired a shotgun which exploded as the firing pin struck the shell. Recovery was allowed the bystander whose action was grounded in tort under a theory of breach of implied warranty of fitness. The Michigan Supreme Court rejected the contention that recovery should be denied under the privity of contract ban. The court emphasized that all vestiges of *Winterbottom* should be laid to rest.

Under much the same rationale, Connecticut sanctioned bystander recovery in Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965), applying section 402A to overcome the manufacturer's defense of lack of privity. The plaintiff's decedent had been killed when a car, left in park gear, rolled onto a golf course, and crushed him. The court declared that no effective argument could be made by the manufacturer of the automobile to preclude recovery by the innocent bystander. Once the defect in the transmission had been shown, the defendant was rightly called upon to account for resulting injury. The outrageous escape through lack of privity should be of no avail to him.

After a rehearing of the original case, Arizona extended coverage to the bystander in Caruth v. Mariana, 11 Ariz. App. 188, 463 P.2d 83 (1970). The appellate court correctly analyzed the argument in favor of the bystander when it concluded that the proper public policy is to protect "injured persons" and not just "users and consumers."

versal success in his law suit, notwithstanding the noncommital language of the *Restatement.*[39] One court correctly analyzed the argument in favor of the bystander when it concluded that "the public policy is to protect 'injured persons' and not just 'users and consumers.' "[40]

A strong indorsement for the Indiana bystander came recently from the Illinois Supreme Court.[41] The court was presented with an action for bystander recovery arising from an accident which occurred in Indiana. After establishing that Indiana law would govern, the court cited *Cornette* as an indication that Indiana would allow bystander recovery in a proper case.

The products liability cases from outside Indiana undeniably reflect the judicial trend toward recognizing the injured third party's right to proceed against a maker of defective goods. The rationale behind the various opinions is that no logical argument can be made for excluding the bystander as a party protected under a strict liability theory. The central purpose of the tort is to make industry responsible for defective goods placed in the stream of commerce. The position that the bystander is not within the class of persons to whom the manufacturer is trying to market his product is a tenuous one. All members of the public are entitled to the protection of strict liability, and, in turn, the losses incurred

---

The Wisconsin Supreme Court, after adopting the doctrine of strict liability in Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), extended section 402A to include the bystander in Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972). The court cited *Sills* as a correct application of the policy protecting innocent third parties.

California, after pioneering the area in *Greenman,* has accepted the bystander as within the scope of strict liability. New Jersey, after giving birth to the leading warranty case, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), has applied the *Henningsen* rationale to allow the third party bystander to recover in Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).

In short, all jurisdictions which have followed the doctrine of strict liability have applied it to include the bystander when the facts presented themselves.

[39]For a good analysis of the *Restatement* position on bystander recovery, see Note, *Blood Transfusions and Human Transplants: A Problem of Proof and Causation,* 4 IND. LEGAL F. 518 (1971). This student work concerns the liability of a manufacturer-supplier of blood transfusion equipment and plasma when a patient contracts hepatitis.

[40]Caruth v. Mariana, 11 Ariz. App. 188, 191, 463 P.2d 83, 86 (1970).

[41]Lewis v. Stran Steel Corp., 285 N.E.2d 631 (Ill. 1972). Recovery was denied here because misuse of the product was found to be a good defense.

by the industry can ultimately be distributed to the public in general.[42]

IV. The Case Against Bystander Recovery

An appreciation of the fact that a decision from the Indiana Supreme Court could reverse the trend of the federal cases on the subject of bystander recovery, makes it necessary to examine critically the bystander's position as plaintiff. Voluminous policy arguments, outlined above, can be advanced in favor of the innocent third party's right to recover against a maker of defective goods. But policy, at least until judicially sanctioned, has little effect as law. A convenient escape for a court faced with a policy argument is to charge the legislature with the responsibility of changing the law. Indeed, judicial legislation is almost uniformly abhorred. Therefore, it is important to inquire into the status of the bystander under existing state law.

The bystander-plaintiff pursuing a manufacturer of defective goods under a negligence theory must overcome a formidable hurdle of proof. Once establishing a lack of ordinary care on the part of the defendant, the injured party faces the problem of causation. Proximate cause, the link between the negligence and the injury,[43] may be extremely difficult for the bystander to establish. He must show that no intervening cause interrupted the causation chain prior to his injury.[44] Therefore, if the product user is negligent

---

[42]The manufacturer is in a position to adequately cover his loss through liability insurance. The expense of this coverage can be passed on to the consumer via increased product prices. This fact is noted in Comment *c* to section 402A:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

[43]McGahan v. Indianapolis Natural Gas Co., 140 Ind. 335, 37 N.E. 601 (1894).

[44]Louisville & Jefferson Ferry Co. v. Nolan, 135 Ind. 60, 34 N.E. 710 (1893).

and his negligence is the source of the ensuing accident, the bystander has no good cause of action against the manufacturer. Of course, in this case, plaintiff may have a good claim against the user and is, therefore, not without a remedy.

Recognition of a tort action based upon breach of implied warranty should run in favor of the bystander-plaintiff.[45] Here recovery does not depend upon proof of negligence, and concepts of foreseeability should not apply.[46] Recovery depends upon proof of a breach which caused injury.

On the other hand, if the plaintiff is seeking to place liability on the manufacturer based upon a "sale" of the product, the bystander is obviously not included as a protected party under the Uniform Commercial Code. A broad reading of contract principles suggests that the bystander might enforce a warranty under a third party beneficiary theory, but Indiana law is explicit in naming the persons protected in sales transactions.[47]

Strict liability is a codification of the breach of implied warranty action grounded in tort. It is clear that the user of a defective product can recover by showing a defect which caused injury.[48] However, it is equally clear that the *Restatement,* if narrowly read, does not expressly sanction recovery for the bystander. Additionally, the appellate court cases of *Cornette* and *Perfection Paint* did not encompass the issue of bystander recovery. Without detracting from the well reasoned opinion in *Sills v. Massey-Ferguson, Inc.,*[49] it is accurate to say that the federal courts have "guessed" at Indiana law.[50] Likewise, the cases outside Indiana are mere persuasive authority for our supreme court.

---

[45]Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969).

[46]Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970).

[47]UCC § 2-318.

[48]Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[49]296 F. Supp. 776 (N.D. Ind. 1969).

[50]The federal court in *Greeno* put it aptly:

> The question is now squarely before this court and must be decided. It is perhaps fortuitous that the Indiana Supreme Court has not yet passed on this issue, but doubtlessly that forward-looking court would embrace the Restatement (Second), Torts sec. 402A, and the many recent cases and authors who have done likewise, as eminently just and as the law of Indiana today.

237 F. Supp. at 433.

V. Summary

The facts calling for decision on bystander recovery have not as yet been presented to the Indiana Supreme Court. Past decisions of the court have impliedly given the bystander-plaintiff an action in negligence[51] with its associated difficulties of proof. Sound policy arguments call for a broadened application of the strict liability theory in order to adequately protect all persons.

Federal courts, sitting in Indiana, have indicated their approval of putting the risk of personal injury upon the manufacturer of defective products. State courts outside Indiana have applauded the public policy considerations and have afforded protection to the injured bystander. The Court of Appeals of Indiana has impliedly approved the same policy considerations in adopting strict liability as Indiana law, but so far has restricted its applicability to the injured user. The trend across the country is well established. Through mounting litigation, manufacturers have been forewarned that they must market their products with the safety of the public foremost in mind. There is little doubt as to the position of the federal courts, sitting in Indiana, as to bystander recovery. Hopefully, the Indiana state courts will adopt the same position when the facts are presented.

Lawrence D. Giddings

---

[51] J. I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964).

RECENT DEVELOPMENTS

ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT—Private letter rulings issued by the Internal Revenue Service held disclosable as interpretations of the law adopted by the agency.— *Tax Analysts & Advocates v. Internal Revenue Service,* 362 F. Supp. 1298 (D.D.C. 1973), *appeal docketed,* No. 1978, D.C. Cir., Sept. 11, 1973.

Tax Analysts and Advocates, a public interest law firm and research organization, sought disclosure under the Freedom of Information Act[1] of certain unpublished letter rulings[2] issued by the Internal Revenue Service over a three-year period. The rulings concerned processes treated as "mining" by the Service for the purpose of determining percentage depletion deductions.[3] In addition to the indices relating to this material, Tax Analysts and Advocates sought certain technical advice memoranda[4] on this subject and all communications to and from the Service with regard to such rulings and memoranda from outside the executive branch of the Government. The Service had expressly resisted efforts to compel disclosure of such letter rulings since it first implemented the Information Act in 1967.[5] The Service contended that the In-

---

[1]5 U.S.C. § 552 (1970). For a detailed analysis of the Act, see K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.19 (Supp. 1970) [hereinafter cited as DAVIS]. Davis' interpretation of the Act as applied to the Internal Revenue Service has been cited with approval in Hawkins v. Internal Revenue Serv., 467 F.2d 787, 794-95 (6th Cir. 1972).

[2]*See* note 17 *infra* & accompanying text.

[3]INT. REV. CODE OF 1954, § 613(c).

[4]A technical advice memorandum is a ruling or an opinion issued by the National Office to a district director in response to the director's request for instructions as to treatment of a specific set of facts relating to a named taxpayer. Tax Analysts & Advocates v. Internal Revenue Serv., 362 F. Supp. 1298, (D.D.C. 1973), *appeal docketed,* No. 1978, D.C. Cir., Sept. 11, 1973.

[5]Treas. Reg. §§ 601.701-02 (1968). No substantive changes in regard to disclosure under the Information Act have been made up to the present.

> This [paragraph 552(a)(2) of the Information Act] applies only to matters which have precedential significance. It does not apply, for example, to administrative manuals on property or fiscal accounting. . . . *Nor does it apply to any ruling or advisory interpretation which is*

formation Act did not apply to private rulings and, even if it did, specific exemptions in the Act precluded disclosure. After extensive discovery both parties moved for summary judgment. The United States District Court for the District of Columbia held that the Information Act did properly apply and issued the general order of disclosure unless within thirty days the Service could show item by item an appropriate exemption.

The Information Act was designed to facilitate disclosure to the public of government information.[6] Besides the information of general applicability required to be published in the Federal Register,[7] the Information Act requires that an agency's final opinions and orders,[8] statements of policy and interpretation,[9] administrative staff manuals and instructions affecting the public,[10] plus a voting record of each agency member engaged in agency proceedings,[11] be made available for public inspection and copying.

---

issued to a taxpayer on a particular transaction or set of facts and applied only to that transaction or set of facts.

Id. § 601.702(b)(1) (1973) (emphasis added).

[6]Prior to the Information Act agencies had to disclose information only "to persons properly and directly concerned." Administrative Procedure Act § 3, 60 Stat. 238 (1946), *as amended*, 5 U.S.C. § 552 (1970).

[7]5 U.S.C. § 552(a)(1) (1970).

[8]*Id.* § 552(a)(2)(A). The Internal Revenue Service publishes annually its Federal Tax Regulations.

[9]*Id.* § 552(a)(2)(B). For the IRS, most of such policy statements and interpretations, as well as opinions and orders, note 8 *supra*, not covered in the Regulations, have been published in the weekly Internal Revenue Bulletin, consolidated and indexed semi-annually in the Cumulative Bulletin.

[10]*Id.* § 552(a)(2)(C). For a list of various portions of the Internal Revenue Manual that have been produced voluntarily or by court order, see Long v. Internal Revenue Serv., 349 F. Supp. 871, 874-75 n.18 (W.D. Wash. 1972). In *Long*, the plaintiffs successfully sought under the Information Act the disclosure of the Closing Agreement Handbook of the Internal Revenue Manual.

In Hawkes v. Internal Revenue Serv., 467 F.2d 787 (6th Cir. 1972), a tax fraud defendant sought through both criminal discovery and the Information Act certain portions of the Internal Revenue Manual and material pertaining to the closing of a tax audit. A plea of nolo contendere ended the discovery process and the district court dismissed the civil complaint filed under the Information Act. The court of appeals held that the nolo contendere plea did not render moot the civil complaint and remanded the suit to the district court where the materials could be examined and ordered disclosed or not in light of the Sixth Circuit's liberal interpretation of the Information Act.

[11]5 U.S.C. § 552(a)(4) (1970).

Disclosure is required unless the material sought falls within one of the nine exemptions of the Act.[12] The nine exemptions are to be narrowly construed[13] and disclosure of a complete document can not be precluded because certain parts of the document are properly exempt.[14] With the burden of proof on the agency to sustain its actions,[15] the federal district court has jurisdiction to enjoin the agency to disclose the information after a de novo review.[16]

In accordance with section 7805 of the Internal Revenue Code, the Commissioner may administer the Code by issuing both private[17] and public rulings.[18] Since such rulings apply the law to a specific set of facts, they allow the taxpayer the advantage of predicting the tax consequences of a particular transaction before he engages in it. Having received a favorable ruling, the taxpayer

---

[12] *Id.* § 552(b)(1)-(9).

[13]

> This section [the Information Act and its nine exemptions] does not authorize withholding of information or limit the availability of records to the public except as *specifically stated* in this section.

Id. § 552(c) (emphasis added). Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

[14] In such a case deletions should be made. 5 U.S.C. § 552(a)(2)(C) (1970). Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970).

[15] 5 U.S.C. § 552(a)(3) (1970). Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970); Long v. Internal Revenue Serv., 349 F. Supp. 871, 875 (W.D. Wash. 1972).

[16] 5 U.S.C. § 552(a)(3) (1970).

[17] Treas. Reg. §§ 601.201(a)-(m) (1973) govern the procedure and effect of rulings. Private rulings consist of "letter rulings" and "determination letters."

> A [letter] "ruling" is a written statement issued to a taxpayer . . . by the National Office which interprets and applies the tax laws to a specific set of facts. . . .

Id. § 601.201(a)(2).

> A "determination letter" is a written statement issued by a District Director in response to an inquiry by an individual . . . which applies to the particular facts involved the principles and precedents previously announced by the National Office. . . .

Id. § 601.201(a)(3).

[18] A public ruling is called a "revenue ruling" issued only by the National Office as the official interpretation of the Code and published in the Internal Revenue Bulletin. *Id.* § 601.201(a)(6).

attaches a copy of it when he files his return.[19] In addition to deciding which rulings to make public in generalized form, the Service may exercise its discretion and refuse to issue any ruling at all in the matter.[20] Furthermore, the Commissioner is not legally bound by a previously issued ruling, even with respect to the party who has received the ruling and relied on it.[21] But it is the usual policy of the Commissioner to honor retrospectively any rulings issued to a taxpayer.[22]

The Service issues over 30,000 private rulings a year,[23] many of which significantly affect the parties involved and the amount of tax revenues collected.[24] That such rulings should remain secret has caused an increasing amount of justifiable criticism.[25] Certainly one of the reasons of success of any self-assessing taxing system is the public belief that like cases are treated alike and that decisions are made on the merits without any favoritism or political influence. Suspicions of favoritism and special treatment are nourished by an atmosphere of secrecy. Furthermore, in the complicated setting of tax law, private rulings tend to benefit only the rich who have the resources to hire skilled tax attorneys to seek favorable rulings. Such tax advice issued by the Service might

---

[19] *Id.* § 601.201(e)(11).

[20]

> There are, however, certain areas where, because of the inherently factual nature of the problem involved, or for other reasons, the Service will not issue rulings or determination letters.

Id. § 601.201(d)(2).

[21] Dixon v. United States, 381 U.S. 68 (1965); Automobile Club v. Commissioner, 353 U.S. 180 (1957).

[22]

> Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued. . . .

Treas. Reg. § 601.201(l)(5) 1973).

[23] Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. INST. ON FED. TAX. 1, 9 (1962).

[24] For some illustrative examples of the impact of private rulings on the parties involved, see Reid, *Public Access to Internal Revenue Service Rulings*, 41 GEO. WASH. L. REV. 23, 24 (1972) [hereinafter cited as Reid, *Public Access*].

[25] *Id.* at 25. *See also* Kragen, *The Private Ruling, An Anomaly of Our Internal Revenue System*, 45 TAXES 331 (1967) [hereinafter cited as Kragen, *Private Ruling*].

apply to others less affluent who then remain ignorant of such secret rulings and are denied their benefits.[26] Also, secret rulings deprive the public of the opportunity to observe the ruling process and determine in advance whether the Service is faithfully executing the law. Because the Service must now serve a dual role of representing the general public in securing revenue and of ruling on a given issue as a judge, public hearings on major tax rulings have been suggested to insure that neither role is neglected.[27] Alternatively, it has been suggested that all rulings be published if they affect a specified minimum amount of possible tax revenue.[28]

Despite such arguments, practical problems for the Service have tended to prevent the disclosure or publication of private rulings.[29] Hence, faced with a reluctant Service and the need to examine private rulings, one must now rely on either discovery motions[30] or, in light of *Tax Analysts & Advocates*, requests sanctioned under the Information Act.

---

[26]Kragen, *Private Ruling*, *supra* note 25, at 336. Among tax attorneys it is common practice to exchange private rulings with each other on a *quid pro quo* basis. Private rulings then become available only to a select group of attorneys of wealthy clients who have sought rulings in the past. *See* Reid, *Public Access*, *supra* note 24, at 29.

[27]Reid, *Public Access*, *supra* note 24, at 40.

[28]A private ruling affecting a court-ordered divestiture of General Motors common stock by E.I. duPont de Nemours & Co. resulted in a tax revenue loss of $56 million. This "unfortunate instance of secret tax favoritism" prompted Senator Gore to introduce S. 2047 which required publication of all rulings affecting $100,000 or more of tax revenue. 111 CONG. REC. 11810 (1965) (remarks of Senator Gore).

> [T]he Internal Revenue Service, for its own mysterious reasons, seems to feel that rulings which affect publicly held corporations, and which directly or indirectly affect perhaps millions of stockholders as well as the general tax paying public should . . . have the veil of secrecy drawn around them.

Id.

[29]To index and publish over 30,000 rulings a year is a staggering task. Deletion of the identifying details with the appropriate explanations would delay the ruling process. See comments of former General Counsel of the IRS Lester Uretz in Uretz, *The Freedom of Information Act and the IRS*, 20 ARK. L. REV. 283, 288 (1967). For the problems created by one taxpayer relying on private rulings issued to another, see comments of former Commissioner Caplin in Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. INST. ON FED. TAX. 1, 22 (1962).

[30]For a case in which the Service successfully prevented disclosure of private rulings sought under both discovery and the Information Act, see Shakespeare Co. v. United States, 389 F.2d 772 (Ct. Cl. 1968), *cert. denied*,

The Information Act requires disclosure of "interpretations . . . adopted by the agency."[31] Although the Service agreed that private rulings are "interpretations,"[32] it contended that "interpretation" as used by the Act means "precedent."[33] Since no private ruling is a "precedent,"[34] the Service argued, private rulings do not fall within the Act. To support this narrow reading of "interpretation," the Service relied upon the House Report on the Information Act in which an agency's "advisory interpretation . . . not cited or relied upon as a precedent in the disposition of other cases"[35] is specifically exempted from the requirement of disclosure. With the statute clear on its face, the court was reluctant to examine legislative history. Nonetheless, it did note that the Senate report,[36] unlike the House equivalent, conformed more closely to the Act itself and for various reasons has been preferred over the House report.[37]

Had the Service prevailed in its argument that "interpretations" of subparagraph 552(a)(2)(B) means "precedents," disclosure of the items would still have been warranted. The contention that rulings are not "precedents" and are not "relied upon" in future Service rulings proved unconvincing. Private rulings and

---

400 U.S. 820 (1970). It should be noted that the Court of Claims had no jurisdiction in the first instance to rule on the Information Act since that jurisdiction is expressly reserved for the district court. 5 U.S.C. § 552(a)(3) (1970). In regard to the discovery motions denied, the Court of Claims still requires "good cause" before discovery is granted. Ct. Cl. R. 71(a). However, since 1970 the Federal Rules of Civil Procedure have eliminated this requirement in regard to documents and materials. Fed. R. Civ. P. 34. *See generally* Curtiss, *Taxpayers Discovery in Civil Federal Tax Controversies*, 51 Neb. L. Rev. 290 (1971).

[31] 5 U.S.C. § 552(a)(2)(B) (1970).

[32] Treas. Reg. § 601.201(a)(2) (1973).

[33] 362 F. Supp. at 1303.

[34]

> A ruling issued to a taxpayer on a particular transaction applies to that transaction only. If the ruling is later found to be in error or no longer in accord with the position of the Service, it will afford the taxpayer no protection with respect to a like transaction. . . .

Treas. Reg. § 601.201(l)(6) (1973).

[35] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

[36] S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

[37] Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971). *See* Davis, *supra* note 1, § 3A.2, at 117.

technical advice memoranda are kept by the Service in an alphabetical file based on the taxpayer's name and are discarded after four years.[38] But if some rulings and memoranda have "any significant future reference value,"[39] they are placed by their author in a separate "reference" file, which, prior to 1967, was called a "precedent file."[40] In order to achieve efficiency and uniformity, such unpublished rulings, indexed and filed, serve as persuasive if not conclusive authority for Service personnel assigned to the ruling process.[41] Despite the claim that private rulings are not precedent, the Service has on at least two occasions attempted to influence litigation with one party by introducing unpublished rulings issued to other parties but involving similar fact situations.[42] Consequently, the Service could not successfully argue that such rulings in no way serve as precedents.

Having decided that private rulings and technical advice memoranda fall within the inclusive section of the Act, Judge Robinson considered the more difficult question of whether or not

---

[38]Brief for Defendant at 4, Tax Analysts & Advocates v. Internal Revenue Serv., 362 F. Supp. 1298 (D.D.C. 1973), *appeal docketed*, No. 1978, D.C. Cir., Sept. 11, 1973.

[39]*Id.* at 5.

[40]*Id.* at 4.

[41]The Service admitted that "[i]f the underlying authorities have not changed and the facts are the same or reasonably similar, a new ruling is bound to hold the same as the old 'reference' ruling. . . ." *Id.* at 6.

[42]In United States Thermo Control Co. v. United States, 372 F.2d 964 (Ct. Cl.), *cert. denied*, 389 U.S. 839 (1967), the Service attempted to prevent an excise tax refund by introducing, among other evidence, an affidavit by its Chief of the Excise Tax Branch "that private rulings have consistently held that truck and trailer refrigeration units were subject to the automotive parts and accessories tax." *Id.* at 966.

In Allstate Ins. v. United States, 329 F.2d 346 (7th Cir. 1964), the Service placed in evidence a number of private rulings given over a twelve-year period to show an unpublished administrative practice, which practice would have granted the plaintiff subsidiary and its parent the right to file a consolidated return had that right been requested. Allstate denied the practice and argued that various provisions in the regulations prevented a consolidated return and that thereby it was entitled to the more favorable alternate growth formula in computing its excess profits tax rather than the average general earnings formula. Neither the district court nor the court of appeals relied on the evidence of the private rulings but decided the case, each differently, in light of published rulings and regulations.

specific exemptions preclude disclosure. The Service relied principally on the third[43] and fourth[44] exemptions.

Section 552(b)(3) exempts from disclosure information already required to be confidential by statute.[45] Section 6103(a)(1) of the Internal Revenue Code provides for the confidentiality of "tax returns." The Service argued that rulings become a part of the return and are statutorily protected from disclosure.[46] The court correctly disagreed with the claim that a ruling was a "return" within the meaning of section 6103(a)(1) of the Code. The Service never knows that a ruling it issues, even if favorable, will be acted upon. If not acted upon, the ruling never becomes a part of a return nor does it lose whatever significant precedent value it had. Yet the Service could not succeed in maintaining that rulings were ultimately disclosable under the Information Act based on whether or not parties acted upon them. Whether the parties act upon them is of no significance when all that one seeks is the Service's answer to a hypothetical problem.

Section 552(b)(4) exempts "trade secrets and commercial or financial information obtained from a person and privileged or

---

[43]5 U.S.C. § 552(b)(3) (1970).

[44]*Id.* § 552(b)(4).

[45]For a list of Internal Revenue Code provisions which clearly fall within the (b)(3) exemption, see Schmidt, *Freedom of Information Act and the Internal Revenue Service*, 20 S. CAL. TAX. INST. 79, 84 (1967).

In discussing the (b)(3) exemption the court overlooked the application of 18 U.S.C. § 1905 (1970). This provision prohibits any United States employee by reason of his employment from divulging "to any extent not authorized by law any information . . . which relates to . . . the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . ." In M. A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 469-70 (D.D.C. 1972), Judge Robinson had earlier rejected the contention of the SEC that section 1905 of Title 18 was included within the set of statutory prohibitions covered by the (b)(3) exemption. *Accord*, Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 580 n.5 (D.C. Cir. 1970); California v. Richardson, 351 F. Supp. 733, 735 (N.D. Cal. 1972); Frankel v. SEC, 336 F. Supp. 675, 678-79 (S.D.N.Y. 1971), *rev'd on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). *But see* Consumers Union of United States, Inc. v. Veterans Adm'n, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

[46]In addition to advising the taxpayer to attach the ruling to his return, note 19 *supra*, the Regulations define a "return" to include any "information returns, schedules, lists and other written statements filed by the taxpayer . . . which are designed to be supplemental to . . . the return." Treas. Reg. § 301-6103(a)-1(a)(3) (1973).

confidential."[47] Undoubtedly, private letter rulings and technical advice memoranda contain "commercial and financial information obtained from a person."[48] The Service contended that such information is submitted in confidence and hence falls within the additional requirement of being "privileged or confidential." The court disagreed. Relying on *Fisher v. Renegotiation Board*,[49] the court held that "confidential or privileged" information within the (b) (4) exemption must be "independently confidential" or "not otherwise subject to public disclosure."[50] This was not satisfied, according to Judge Robinson, by an agency promise that material would be kept confidential.[51] The fact that a party might justifiably rely on such a promise was not considered by the court.

Judge Robinson failed to mention any of the cases in which the basis of confidentiality for the (b) (4) exemption was either

---

[47]For a comprehensive discussion of the fourth exemption, see DAVIS, *supra* note 1, § 3A.19.

[48]"Obtained from a person" in paragraph 552(b) (4) does not include a person within the government. Benson v. General Serv. Adm'n, 289 F. Supp. 590, 594 (W.D. Wash.), *aff'd*, 415 F.2d 878 (9th Cir. 1969); Consumers Union of United States, Inc. v. Veterans Adm'n, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

[49]473 F.2d 109 (D.C. Cir. 1972). The court's reliance on *Fisher* was ill-founded because *Fisher* did not concern the standard of confidentiality for the (b) (4) exemption. Rather, in *Fisher* the court of appeals was concerned with the justification for deleting identifying details from material that fell within the inclusive section of the Act. *See* 5 U.S.C. § 552(a) (2) (C) (1970). *Fisher* held that deletion was not proper for all material that was "submitted in confidence" but only proper for material that was "independently confidential within the meaning of exemption 4" or "not otherwise publicly disclosed." 473 F.2d at 113. *Fisher* did not elaborate on what was a sufficient basis of confidentiality for the (b) (4) exemption. It simply held that once material met that standard of confidentiality plus other requirements of the (b) (4) exemption, deletions may be proper.

[50]

> A bare claim or promise of confidentiality will not suffice, for material must be independently confidential based on their contents, i.e. not otherwise subject to public disclosure.

362 F. Supp. at 1307. "To allow a promise of confidentiality by the agency to control would enable the agency to render meaningless the statutory scheme." *Id.* at 1307 n.50.

[51]Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), was cited for the proposition that "the statutory scheme [of the Information Act] does not permit a bare claim of confidentiality to immunize agency files from scrutiny." 362 F. Supp. at 1307 n.50. But all the *Bristol-Myers* court meant by this was that the "validity and extent of the claim" of confidentiality was subject to judicial scrutiny. 424 F.2d at 938.

directly or indirectly at issue. An examination of those cases reveals that two independent standards of confidentiality have been used. As subsequent discussion will show, one involves an "agency promise" standard; the other involves an "objective content" standard.

In *Tax Analysts & Advocates,* the court expressly rejected the contention that an agency promise of confidentiality satisfied the confidentiality requirement of the (b) (4) exemption.[52] The court did not mention a Ninth Circuit opinion in which the "agency promise" standard of confidentiality for the (b) (4) exemption was first endorsed. In *General Services Administration v. Benson,*[53] a party, who had purchased certain property from the General Services Administration and then resold it, sought disclosure under the Information Act of material obtained by the GSA including two appraisal reports. The GSA argued that the two appraisal reports fell within the (b) (4) exemption. The court of appeals found the material outside the exemption for the reason that those who submitted the financial information, the appraisers, did not seek confidentiality *on their own behalf* but on behalf of their client, the GSA.[54] In interpreting the basis of confidentiality for the (b) (4) exemption, the court of appeals held that an individual's wish to keep information confidental on his own behalf provides a proper basis of confidentiality for the (b) (4) exemption.[55] Professor Davis shares this view.[56] More importantly, in *Tax Analysts & Advocates,* the court cited as authority a case from its own court

---

[52]*See* note 48 *supra.*

[53]415 F.2d 878 (9th Cir. 1969).

[54]*Id.* at 881-82.

[55]

> The district court further stated that "the exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential." This conclusion as to the meaning of "confidentiality" seems correct.

Id. at 881.

[56]Professor Davis finds the (b) (4) exemption "troublesome" not because it fails to provide a proper basis for what should be treated as "confidential" but rather because it confines the privileged information to commercial or financial.

> [W]hen a government officer induces a corporation to furnish him some non-commercial and non-financial information, with a good faith understanding that the information will be kept confidential, can the

of appeals which in dictum conflicts with the former court's position on the "agency promise" standard of confidentiality for the (b) (4) exemption.[57] In *Getman v. NLRB*,[58] the NLRB sought to resist disclosure of names and addresses of employees who were eligible to vote in certain representation elections. Among other exemptions, the Board relied on the (b) (4) exemption. The court of appeals found the exemption inapplicable because the names and addresses were clearly not "financial or commercial information" nor were they given to the Board with *"any express promise of confidentiality."*[59] This would imply that for the United States Court of Appeals for the District of Columbia Circuit an express promise of confidentiality by an agency is at least one basis of confidentiality for the (b) (4) exemption. The Service's letter ruling procedure contains no such express promise of confidentiality. But revenue procedures do state that when rulings are published, "it will be the practice" to preserve the confidentiality of the financial details and parties involved.[60] One can only speculate on the number of parties who clearly rely on such "practice" when seeking a ruling. Nonetheless, for them the exemption could not be clearer. They are submitting to the government financial or commercial information which, at least in one sense, is "privileged or confidential."

Judge Robinson also ignored the "objective content" standard of confidentiality for the (b) (4) exemption first used by the

---

fourth exemption be interpreted to protect the information from required disclosure?

The requirements of common sense directly collide with the clear statutory language. *Obviously, the good faith understanding that the information will be kept confidential should be honored.*

DAVIS, *supra* note 1, § 3A.19, at 146-47 (emphasis added).

[57] 362 F. Supp. at 1307 n.53.

[58] 450 F.2d 670 (D.C. Cir. 1971).

[59] *Id.* at 673 (emphasis added).

[60]

It will be the practice of the Service to publish as much of the ruling or communication as is necessary for an understanding of the position stated. However, in order to prevent unwarranted invasion of personal privacy and to comply with statutory provisions . . . dealing with disclosure of information obtained from members of the public, identifying details, including names and addresses of persons involved, and information of a confidential nature are deleted from the ruling.

Rev. Proc. 72-1, 1972-1 CUM. BULL. 694.

United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*[61] and later discussed and defended by that court in *Sterling Drug, Inc. v. FTC.*[62] As explained by *Sterling Drug,* the "objective content" standard of confidentiality is satisfied if the material "would customarily not be released to the public by the person from whom it was obtained."[63] This standard of confidentiality for the (b) (4) exemption was endorsed by Judge Robinson himself in *M. A. Schapiro v. SEC*[64] just sixteen months before *Tax Analysts & Advocates.* In deciding that the (b) (4) exemption applies, according to Judge Robinson, a court should not consider whether the information was submitted on the basis of an express or implied promise of confidentiality but rather "should determine, on an objective basis, that this is not the type of information one would reveal to its public."[65] In an extraordinary oversight, Judge Robinson failed to consider, in *Tax Analysts & Advocates,* whether the information contained in private letter rulings is or is not the type of information one would reveal to the public. Most assuredly such financial information is not ordinarily revealed to the public. This is the opinion of Judge Gasch, also from the United States District Court for the District of Columbia, in *National Parks & Conservation Association v. Morton,*[66] decided only six months before *Tax Analysts & Advocates.* In *National Parks,* the court held that annual financial statements, secured by the Director of the National Park Service in an audit of various concession operators, contained information of the type "that would not generally be made available for public perusal"[67] and hence were "confidential" within the (b) (4) exemption.

---

[61] 425 F.2d 578 (D.C. Cir. 1970). In *Grumman* a contractor sought disclosure of orders and opinions of the Renegotiation Board involving fourteen other companies. The Board relied unsuccessfully on a blanket use of the (b) (4) exemption. The court of appeals remanded for *in camera* inspection with the order to make deletions of identifying details in the case of matter falling within the (b) (4) exemption. "Confidential" information for the court was that "information the contractor would not reveal to the public." *Id.* at 582.

[62] 450 F.2d 698, 709 (D.C. Cir. 1971).

[63] *Id.* at 709, *quoting from* S. REP. No. 813, 89th Cong., 2d Sess. 9 (1965).

[64] 339 F. Supp. 467, 471 (D.D.C. 1972).

[65] *Id.* at 471.

[66] 351 F. Supp. 404 (D.D.C. 1972).

[67] *Id.* at 407.

Judge Robinson's failure to examine the basis of confidentiality for the (b)(4) exemption might be explained by his belief that the deletion of identifying details would rehabilitate any information found to be "confidential" by whatever standard one would care to use. Deletion of identifying details is provided for in the Information Act to prevent a clearly "unwarranted invasion of personal privacy."[68] Although the deletion provision is limited to "personal privacy," courts have extended the provision to the (b)(4) exemption, and hence have allowed the disclosure of material which, without the deletion of identifying details, would clearly fall within the exemption.[69] In *Tax Analysts & Advocates*, the court held that even if the Service had shown that private rulings fell within the (b)(4) exemption, it had failed to show that confidentiality could not be preserved by the deletion of identifying details. The Service admitted that there were two private rulings and eight technical advice memoranda which fell within the disclosure request.[70] The rulings and memoranda sought were relatively simple, involving no more than a description of a particular "mining" process and the Service's determination whether the process qualified as a section 613(c) mining process. Other private rulings, however, are complex and highly particularized involving inventories, depreciation schedules, dividend distribution plans, and transfers of stock and securities. Given such data plus a specialized knowledge of the facts already available, one with a desire to know could not be prevented from reconstructing from the details the identity of the parties involved.[71] This limitation on the deletion requirement was recognized by the District of Columbia circuit in *Sterling Drug, Inc. v. FTC*[72] for certain financial material

---

[68]5 U.S.C. § 552(a)(2)(C) (1970). This deletion provision qualifies and limits the inclusive section of the Act.

[69]Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Legal Aid Soc'y v. Schultz, 349 F. Supp. 771 (N.D. Cal. 1972).

[70]362 F. Supp. at 1302.

[71]An obvious example of this is the private ruling issued pursuant to the court ordered divestiture of General Motors common stock by E.I. duPont de Nemours & Co. and Christiana Securities Co., note 28 *supra*. There is no effective way that the Service can reveal the ruling and still maintain the anonymity of the parties involved. The problem of preserving confidentiality when the request for information is highly particularized or focuses on a single party was recognized as a hypothetical problem by the court of appeals in Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 581 (D.C. Cir. 1970), but no answer was provided.

[72]450 F.2d 698 (D.C. Cir. 1971).

contained in a FTC merger clearance request.[73] Similarly, in *National Parks & Conservation Association v. Morton*,[74] the district court held that annual financial statements of concessioners obtained in an audit by the Director of the National Park Service could not be rendered anonymous by the deletion of identifying details.[75] After arguing on appeal[76] that Judge Robinson has ignored the two bases of confidentiality for the (b) (4) exemption, the Service could be expected to argue that private rulings, if disclosed at all, must remain particularized and that vast numbers of them cannot be effectively rendered anonymous by the deletion of identifying details.

Contrary to the holding of *Tax Analysts & Advocates*, the (b) (4) exemption should shield from disclosure financial information contained in private rulings which can not be rendered anonymous. This fact, however, does not prevent the Service from publishing such rulings on its own initiative or making them otherwise available.[77] The Service should attempt to accommodate the purpose of the (b) (4) exemption with the Information Act's overall policy of disclosure. As evidenced by the reference to "trade secrets," the central purpose of the (b) (4) exemption—especially as it relates to corporate parties—is to preserve the competitive position of parties who, for various reasons, submit commercial

---

[73]"The judge's descriptions also lead us to believe that making deletions will not render the documents subject to disclosure under the Act." *Id.* at 709.

[74]351 F.Supp. 404 (D.D.C. 1972).

[75]

> The Court further finds that any deletions would not alter the basic confidential nature of these documents nor ensure anonymity and privacy of the concessioners who submitted the detailed financial information to the government.

Id. at 407.

[76]The Justice Department has filed notice of appeal but has decided not to pursue the (b) (4) exemption but to rely on only the (b) (3) exemption. 54 P-H FED. TAX REP. BULL. ¶ 60,595 (1973).

[77]

> Even though an exemption . . . may be fully applicable to a matter in a particular case, the . . . Service may, if not precluded by law, elect under the circumstances of that case not to apply the exemption to such matter. The fact that the exemption is not applied by the Service in that particular case has no precedential significance . . . but is merely an indication that in the particular case involved the Service finds no compelling necessity for applying the exemption to such matter.

Treas. Reg. § 601.701(b) (3) (1973).

or financial information to the government.[78] In the case of individuals there is also the provision in the Act which authorizes the deletion of identifying details to prevent an "unwarranted invasion of personal privacy."[79] When the Service issues a ruling, it should not assume that the information contained therein, because it is information not customarily disclosed, will, if disclosed, hinder the party's competitive position or cause some other harm. The Service should adopt the policy of making private rulings available for public inspection unless the party requesting such ruling can demonstrate a substantial threat to his competitive position or a serious invasion of personal, not corporate, privacy. In the case of information submitted to the Federal Trade Commission for merger clearance, the FTC requires a party to justify any request made for nondisclosure before it will even consider, according to its own rules, the appropriateness of such a request.[80] If substantial harm from disclosure is demonstrated, the Service should delete identifying details if the information can be effectively rendered anonymous. If anonymity can not be assured, the Service should notify the party that if it issues the ruling, it will remain private only for a specified period of time. The party would then have the option to withdraw the ruling request. Such a pro-

---

[78]

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

[79] 5 U.S.C. § 552(a)(2)(C) (1970). This deletion provision qualifies and limits the inclusive section of the Act.

[80]

> All requests for advice . . . concerning proposed mergers, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the Commission with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public.

16 C.F.R. § 1.4(b) (1973). In only one reported case, Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.D.C. 1971), was information contained in a merger clearance sought under the Information Act. The court denied disclosure.

cedure would conform with the existing practice of issuing no-action letters by the Securities and Exchange Commission.[81] Since 1970, the SEC has made available to the public all of its no-action letters.[82] No provision is made for the deletion of identifying details although a party can receive confidential treatment for ninety days if he can show a need for it.[83] If the SEC finds the request reasonable, it will grant it; otherwise, the party is notified of its option to withdraw the request.[84]

If the decision in *Tax Analysts & Advocates* is sustained on appeal, it will not create a sudden increase in refund suits by parties who thereby determine that others similarly situated were treated differently. It has always been established that each taxpayer must show the validity of his own claims and not rely on tax rulings issued to another.[85] But what is true at the refund stage may not be true at the negotiation stage or even earlier when one is requesting a similar ruling. To the degree that Service personnel are inclined to retain and index past rulings with "any significant reference value"[86] they are persuaded, though certainly not bound, by previous rulings. Any attorney who enters into negotiation with the Service will benefit by being armed with a series of favorable rulings.[87] As the court noted, such rulings are already disseminated among select groups of tax attorneys and it is unfair for some attorneys to benefit by the rulings while others remain ignorant of them.[88]

---

[81]For a discussion of SEC procedure and no-action letters, see Lowenfels, *SEC "No-Action" Letters: Some Problems and Suggested Approaches*, 71 COLUM. L. REV. 1256 (1971).

[82]17 C.F.R. § 200.81 (1973).

[83]*Id.* § 200.81(b).

[84]*Id.*

[85]Hanover Bank v. Commissioner, 369 U.S. 672 (1962); Bookwalter v. Brecklein, 357 F.2d 78 (8th Cir. 1966); Goldstein v. Commissioner, 267 F.2d 127 (1st. Cir. 1959); Bornstein v. United States, 345 F.2d 558 (Ct. Cl. 1965). The only exception to this in recent years is IBM v. United States, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966). In that case the Court of Claims allowed IBM to be treated the same as Remington Rand, IBM's only competitor in the computer market, when IBM sought to receive the same ruling that Remington Rand had received.

[86]*See* note 39 *supra* & accompanying text.

[87]*See* Circuit, *What You Have Always Wanted to Know About the IRS but Were Afraid to Ask*, 51 TAXES 389 (1973).

[88]362 F. Supp. at 1309-10.

The most beneficial result that might follow from *Tax Analysts & Advocates* is the public scrutiny of the occasional Service rulings which affect millions of dollars of tax revenue. Without public hearings for major tax rulings,[89] disclosure will come only after the ruling has issued. Nonetheless, the Service will no doubt become more reluctant to rule favorably unless it is certain that it can answer any ensuing public criticism. The public needs the assurance that it can review and criticize the Service more than the Service needs to be reviewed and criticized. Public scrutiny will strengthen confidence in the Service, a necessity for a successful, self-assessing tax system.

CONSTITUTIONAL LAW—FAIR HOUSING ACT OF 1968—Anti-blockbusting provision held to be a valid congressional exercise of thirteenth amendment enforcement power.—*United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574).

The Department of Justice, pursuant to 42 U.S.C. section 3604(e),[1] the Fair Housing Act of 1968,[2] alleged that Bob Lawrence Realty, Inc., and four other real estate brokers had engaged in prohibited blockbusting activities. The Government sought injunctive relief in accordance with section 3613.[3] The United

---

[89] *See* Stone, *Public Hearings for Private Rulings—Four Recommendations*, in TAXATION WITH REPRESENTATION, COMPENDIUM ON THE PUBLIC AND THE RULING PROCESS, 72-143 (1972), *cited in* Reid, *Public Access*, *supra* note 24, at 24.

[1] 42 U.S.C. § 3604 (1970) reads in pertinent part:

> [I]t shall be unlawful—
>
> . . .
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

[2] *Id.* §§ 3601-19.

[3] Section 3613 reads as follows:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this

States Court of Appeals for the Fifth Circuit in *United States v. Bob Lawrence Realty, Inc.*,[4] affirmed the trial court's injunction which prohibited certain types of solicitation[5] and affirmed the constitutionality of section 3604(e). The court also held that the Attorney General need not allege the existence of a conspiracy or concerted action in order to have standing under section 3613.

The Government complaint alleged that prohibited statements were made by agents of Bob Lawrence Realty, Inc., and four other real estate brokers during the period from January to June 1969.[6] The alleged blockbusting activity occurred when the agents made statements relative to the changing racial composition of a transitional southeastern Atlanta neighborhood in an attempt to induce the sale of homes. The Government complaint specifically alleged that agents of Lawrence Realty engaged in prohibited activities on a single afternoon but contained no allegation of subsequent illegal

---

subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

[4]474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574).

[5]In pertinent part the decree reads:

> [T]he defendants and their agents, employees, successors, and all those acting in concert or participation with them . . . are hereby permanently enjoined from inducing or attempting to induce any person to sell or rent any dwelling by any explicit or implicit representations regarding the entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin;
>
> . . .
>
> [T]he defendants shall conduct all solicitation effort in such a manner so that the type and amount of solicitation activity shall be essentially similar in all areas in which the defendants conduct business and the defendants shall not conduct a greater amount or a different type of solicitation in areas which are inhabited by Negroes, or partially inhabited by Negroes, than in areas which are not so inhabited . . . .

United States v. Mitchell, 335 F. Supp. 1004, 1007 (N.D. Ga. 1971).

[6]United States v. Bob Lawrence Realty, Inc., 327 F. Supp. 487, 490 (N.D. Ga. 1971).

activities;[7] however, the other defendants were charged with repeated violations during the six month period.[8]

Section 3613 authorizes an action for preventive relief by the Attorney General when he has reasonable cause to believe that a pattern or practice of discrimination exists or when the occurrence of discriminatory activity raises an issue of general public importance. The Government's complaint, which contained no allegation of any agreement or formal business connection among the defendants, included three claims. First, it was alleged that the acts of the several defendants, when considered together, constituted a group pattern or practice of resistance to rights granted under section 3604(e). Second, the Government alleged that the acts of several defendants, considered individually, constituted a prohibited individual pattern or practice on the part of each of the defendants.[9] Finally, the complaint alleged that the defendants' acts had denied to a group of homeowners rights granted by section 3604(e) and that such denial raised an issue of general public importance.[10]

Shortly before the trial, consent decrees were entered against two of the original defendants and the action against a third dismissed.[11] The suit against defendant Lawrence was then joined

---

[7]The agents were engaged in the practice of making "cold calls"—asking homeowners if they wished to list their houses for sale—a practice which, although not uncommon in the real estate industry, was not a common practice with the agents of Bob Lawrence Realty, Inc. Brief for appellants, Bob Lawrence Realty, Inc., and Bobby L. Lawrence, at 6-7, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574) [hereinafter cited as Appellant's Brief.]

[8]327 F. Supp. at 490-91.

[9]The first two claims are based on the so-called "first alternative" of section 3613 which allows the Attorney General to bring an action for injunctive relief when he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of rights" granted by the Civil Rights Act of 1968.

[10]The third claim is based on the "second alternative" of section 3613 which allows the Attorney General to bring an action when he has reasonable cause to believe that "any person or group of persons has been denied any rights granted by this subchapter and such denial raises an issue of general public importance."

[11]474 F.2d at 118. The remaining codefendant, Stanley Realty Co., was alleged to have made prohibited statements through its agents in the same neighborhood and during the same time period as defendant Lawrence. The government complaint alleged that the activities of the two remaining defendants when considered along with the activities of other nondefendant real

with a companion action *United States v. Mitchell.*[12] The district court found that the evidence established a group pattern or practice of prohibited activities as alleged in the Government's first claim. The trial court also found that each of the agents knew of the transitional nature of the neighborhood and attempted to capitalize on the emotional environment; accordingly, the trial court deemed such findings sufficient to support the injunctive relief requested by the Attorney General.[13]

On appeal, defendant Lawrence challenged the constitutionality of section 3604(e) by alleging that Congress lacked authority to enact such a statute and that the statute violated the first amendment.

Citing *Jones v. Alfred H. Mayer Co.*,[14] in which the Supreme Court revitalized the thirteenth amendment[15] after nearly one hun-

---

estate companies constituted a group pattern or practice of prohibited activities. 335 F. Supp. at 1006.

The district court denied a motion by defendant Lawrence for jury trial since only equitable relief was sought. The trial court also denied a motion for severance and noted that "in view of the nature of this action, the relief sought, and the fact the case will not be tried to a jury it [did] not appear that separate trials [were] necessary to avoid prejudice to the defendants." United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870, 871 (N.D. Ga. 1970). On a later motion for summary judgment, the district court, in granting a partial summary judgment to defendant Lawrence, concluded that the government allegations with regard to the second claim were inadequate to establish an individual pattern or practice on the part of the defendant. 327 F. Supp. at 490. Summary judgment on the other claims was denied. *Id.* at 494.

[12]335 F. Supp. 1004 (N.D. Ga. 1971). The *Mitchell* case involved similar section 3604(e) allegations against the Mitchell Realty Co. The alleged illegal activity occurred in an area in southwest Atlanta and the facts in the *Mitchell* case had no relation to those in the *Lawrence* case. However, since the legal issues were the same, the trial court issued a common decree. *Id.* at 1007-08.

[13]*Id.* at 1006. The court noted that it was not impressed with the gravity of the individual transgressions and stated, "[I]n fairness to the defendants and in amelioration of the injunction to be entered the court cannot omit an observation that at least in some instances the agents were more sinned against than sinning." *Id.* The court then noted that one of the complaining witnesses admitted she was out to "get" the agent's license because the purchaser he produced had backed out on the purchase contract. The court also noted that some of the homeowners in the neighborhood were affiliated with a neighborhood organization which advised its members to "encourage agents to make racial representations." *Id.* at 1007.

[14]392 U.S. 409 (1968).

[15]This amendment provides:

dred years of inactivity, the court of appeals held that the enactment of the Fair Housing Act of 1968 was authorized by the thirteenth amendment enabling clause. The Court in *Jones* held that the thirteenth amendment "by its own unaided force and effect . . . abolished slavery, and established universal freedom."[16] It reasoned that the enabling clause empowered Congress to pass laws necessary and proper for abolishing all "badges and incidents of slavery"[17] within the United States. The only limitation placed on Congress was that it rationally determine what are "badges and incidents" of slavery and translate such determinations into effective legislation.[18]

The court of appeals felt it to be the clear mandate of *Jones* that courts give great deference to the determinations of Congress in its efforts to effectuate the purpose of the thirteenth amendment. This reasoning is consistent with the liberal standard of constitutional review established in *Katzenbach v. Morgan*[19] with regard to congressional enforcement powers. *Morgan* upheld the constitutionality of the Voting Rights Act of 1965 as a valid exercise of congressional power under the enforcement section of the fourteenth amendment and stated that a court in reviewing the constitutionality of the statute need only "perceive a basis upon which the Congress might resolve the [conflicting interests] as it did."[20]

To establish a rational basis for the congressional action, the court of appeals adopted the reasoning of an earlier district court decision *Brown v. State Realty Co.*[21] The district court found that section 3604(e) was a valid exercise of thirteenth amendment congressional power; furthermore, the Act was held to be a reasonable means of accomplishing the legislative purpose to provide fair

---

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[16]392 U.S. at 439.

[17]*Id.*

[18]*Id.* at 440.

[19]384 U.S. 641 (1966).

[20]*Id.* at 653.

[21]304 F. Supp. 1236 (N.D. Ga. 1969).

housing throughout the United States.[22] The district court in *Brown* reasoned that blockbusting was a fundamental element in the perpetuation of segregation and therefore a "badge" of slavery which Congress was authorized to eliminate.[23] Similar reasoning was utilized in *United States v. Mintzes*[24] which also upheld the constitutionality of section 3604(e).

Finding section 3604(e) valid under the thirteenth amendment, the court of appeals avoided discussion of congressional authority to enact the Fair Housing Act of 1968 under either the commerce clause or the fourteenth amendment.[25] The thirteenth amendment analysis is adequate so long as the Fair Housing Act prohibitions are limited to discrimination against Negroes. Such was the situation presented in *Lawrence*. However, the thirteenth amendment deals solely with the rights of freed Negro slaves and problems arise when an attempt is made to justify the Act's prohibition of discrimination based on religion or national origin. These types of discrimination seem more appropriately dealt with under the commerce clause or fourteenth amendment. Indeed, such was the congressional intent.[26] Moreover, it must be remembered

---

[22]42 U.S.C. § 3601 (1970).

[23]304 F. Supp. at 1240.

[24]304 F. Supp. 1305, 1313 (D. Md. 1969).

[25]474 F.2d at 121 n.9.

[26]*Hearings on S. 1358, S. 2114 and S. 2280 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 13-14, 256-59 (1967) [hereinafter cited as 1967 *Hearings*].

[27]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), approved federal regulation of intrastate activities which have such a "close and substantial relation to interstate commerce that their control is essential or appropriate to protect commerce from burdens and obstructions." *Id.* at 37. *Jones & Laughlin* cleared the way for a vast expansion of federal regulation of commerce. Since 1937 when *Jones & Laughlin* was decided, no federal legislation has been struck down by the Supreme Court as beyond the scope of the commerce clause power. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 116 (1964).

The Supreme Court in United States v. Darby, 312 U.S. 100 (1940), held that Congress may regulate intrastate activities so long as the regulated activities fall within a class of activities which affect interstate commerce. *Id.* at 120-21.

[28]Katzenbach v. McClung, 379 U.S. 294 (1964).

> [T]he mere fact that Congress has said [a] particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for

that at the time of the Act's passage, the thirteenth amendment had not been "revitalized" by *Jones*.

Although the court of appeals did not deal with the commerce clause or fourteenth amendment authorization for the Fair Housing Act, had it elected to do so the court might well have reasoned that Congress, under the commerce clause, has plenary power over commerce among the several states and the scope given to such power by the Supreme Court has been exceptionally broad.[27] The commerce clause has provided the basis for other civil rights legislation. Affirming the public accommodation provisions of the Civil Rights Act of 1964, the Supreme Court stated that the outer constitutional limits of the commerce clause power are established by a "rational basis" test.[28] When the Court finds that Congress, in light of the information available to it, had a rational basis for finding a particular regulatory scheme necessary for the protection of commerce, the legislation will be affirmed.[29] In view of the historically liberal interpretation given the commerce clause, the validity of the Fair Housing Act of 1968 as an exercise of congressional power seems apparent.[30]

The validity of an alternative constitutional foundation for the Fair Housing Act of 1968 in the fourteenth amendment enabling clause is less certain. However, it has been argued[31] that the expansive interpretation given to the fourteenth amendment enabling clause in *Katzenbach v. Morgan*[32] justifies such reasoning. In this context *Morgan* has been viewed as an attempt to establish clear cut congressional power to enforce the fourteenth amendment and partially relieve the courts of the burden of achieving equal protection.[33] It is reasoned that after such a clear call for legisla-

---

finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Id. at 303-04.

[29]A future court might reason that the rational basis for the Fair Housing Act of 1968 was the interstate character of the residential construction and real estate industry. Congress relied heavily upon statistical data showing a considerable interstate movement of residential construction materials and financing. The statistical information also showed a significant interstate mobility of purchasers and lessees. 1967 *Hearings* 13-14, 256-59.

[30]*Contra*, Brown v. State Realty Co., 304 F. Supp. 1236, 1239-40 (N.D. Ga. 1969); United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969).

[31]Cox, *The Supreme Court, 1965 Term—Forward:—Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

[32]384 U.S. 641 (1966).

[33]Cox, *supra* note 31, at 122.

tive leadership, the courts will certainly accord great deference to the congressonal determination of the most appropriate means to accomplish the goal of equal protection.[34]

Morgan involved state action in the form of state voting requirements which denied the franchise to non-English speaking voters. However, in the typical blockbusting case the absence of even indirect state involvement would block the application of the *Morgan* reasoning.[35] Furthermore, it should be noted that the Supreme Court in *Jones* based its holding on the thirteenth amendment[36] and avoided the fourteenth amendment rationale presented by the petitioner.[37]

Although the court of appeals in *Lawrence* limited its discussion of constitutional authorization to the thirteenth amendment, future decisions dealing with the constitutionality of the Fair Housing Act of 1968 would be strengthened by recognition of the additional constitutional basis provided by the commerce clause.

---

[34] *Id.* at 121.

[35] *But see id.* Archibald Cox proposed that *Morgan* might provide the formula for authorizing congressional action under the fourteenth amendment without direct state action. As an example he suggested that:

> [A] law prohibiting discrimination against Negroes in the sale and rental of housing could well be viewed as a means of bringing about the break-up of urban ghettos which are serious obstacles to the states' performance of their constitutional duty not to discriminate in the quality of education and other public services.

Id. at 102.

[36] 392 U.S. at 413 n.5.

[37] A more radical argument can be made that in United States v. Guest, 383 U.S. 745 (1965), six members of the Supreme Court, in two separate opinions, *id.* at 762 (Clark, J., concurring, joined by Black & Fortas, J.J.), and *id.* at 775 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., & Douglas, J.), rejected the state action requirement as a prerequisite to federal legislation under the fourteenth amendment. However, this seems to overstate the import of the two separate opinions. The statements supporting such argument were clearly dicta. *Guest* involved private interference with the use of public facilities. The better reading of the case seems to be that the two separate opinions abandoned the requirement of positive state action but retained the requirement of indirect state involvement before federal action under the fourteenth amendment is authorized. *See* Note, *Fourteenth Amendment Congressional Power to Legislate Against Private Discrimination: The* Guest *Case*, 52 CORNELL L.Q. 586, 589 (1967). In *Guest* the indirect state involvement occurred when an individual was denied use of a public highway by the private conspirators. However, in the typical blockbusting case the absence of any such public facility would defeat the applicability of this reasoning.

To do so would give recognition to the congressional intent expressed at the time of enactment of the Fair Housing Act. However, the alternative justification based on the fourteenth amendment seems far more doubtful due to the absence of even indirect state action and is less likely to receive judicial acceptance.

Rejecting the appellant's second constitutional challenge, the court of appeals held that section 3604(e) was a permissible attempt to regulate commercial activity and not a prior restraint of free speech. The court noted that section 3604(e) deals only with statements made for profit[38] and that in certain situations the government may prohibit purely commercial speech in connection with conduct which the government may regulate. The court viewed any limitation of speech as justified by the government's overriding interest in preventing blockbusting activities.[39]

The distinction made by the court of appeals between commercial speech and speech of a social or political nature has been approved by the United States Supreme Court. *Valentine v. Chrestensen*,[40] the first of an unbroken line of cases, affirmed enforcement of an ordinance which prohibited the distribution of commercial handbills. The Court held that while the freedom to communicate information and disseminate opinion enjoys the fullest protection of the first amendment, the Constitution imposes no such restraint on the government with respect to purely commercial advertising.[41] In the commercial context, advocate rights are not involved.[42]

The illegal statements made by the agents of Lawrence Realty occurred during uninvited solicitation for listings. Each listing acquired carried the potential of a commission and therefore clearly fulfills the "for profit" requirement of section 3604(e). The court of appeals reasoned that such representations were of a commercial

---

[38]474 F.2d at 121-22.

[39]*Id.* at 122.

[40]316 U.S. 52 (1942).

[41]*Id.* at 54.

[42]Beard v. Alexandria, 341 U.S. 622, 641 (1951). *Accord,* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972) (affirming the Federal Communication Commission's prohibition of cigarette advertising on television).

nature and not afforded blanket first amendment protection; therefore, such statements may be proscribed by proper legislation.[43]

It should be noted that the injunction affirmed by the court of appeals was not a complete prohibition of solicitation. It merely prohibited the use of certain types of statements in an effort to induce listing or sale of homes.[44] In order to identify prohibited representations, the district court utilized a "reasonable man test." A representation is illegal if a reasonable man, in light of the circumstances, would regard the words and acts of the defendant as constituting an inducement to sell his home because members of a minority group are moving into the neighborhood.[45] Such representations were proscribed only if made for profit. Section 3604(e) in no way limits the discussion of the racial composition of a given neighborhood in a social or political context. The district court noted that because of the emotional atmosphere in a transitional neighborhood,[46] direct mention of a particular racial or minority group is not required to accomplish the blockbuster's objective. Therefore, utilization of a reasonable man test gives the court the flexibility required for effective enforcement.

Utilization of the reasonable man test also eliminates a conflict more apparent than real between two earlier district court decisions construing section 3604(e). *Brown v. State Realty Co.*[47]

---

[43]*Beard* upheld the validity of an ordinance prohibiting commercial door-to-door solicitation against a due process attack by holding that even legitimate occupations may be restricted or prohibited in the public interest. The problem was held to be legislative when there is a reasonable basis for legislative action. 341 U.S. at 632-33. *Accord*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (affirming a state statute which prohibited all advertising of the sale of eyeglasses).

[44]*See* note 5 *supra*.

[45]327 F. Supp. at 489.

[46]Commenting on the atmosphere in a transitional neighborhood, the trial court stated:

> In this maelstrom the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations as to race or as to what is going on. On the contrary both sides already know, all too well, what is going on. In short, for an agent to get a listing or make a sale *because* of racial tensions in such an area is relatively easy, whereas the direct *mention* of race in making the sale is superfluous and wholly unnecessary.

335 F. Supp. at 1006.

[47]304 F. Supp. 1236 (N.D. Ga. 1969).

imposed an obligation on realty agents to "refrain absolutely" from prohibited representations even if the subject of neighborhood transition is first raised by the homeowner.[48] *United States v. Mintzes*,[49] on the other hand, would impose no liability for an honest answer given in response to a question raised by the homeowner.[50] Since *Brown* speaks only of prohibited representations, presumably no liability would attach if a reasonable man would interpret the agent's statement as an honest and accurate response to the homeowner's question made without an intent to induce panic sale. Thus, the approach adopted in *Mintzes* seems more in keeping with the purpose of the Act, namely to protect the homeowner from unsolicited representations tending to induce panic sale and not inconsistent with the better reading of the *Brown* decision.

In the second major part of the opinion, the court of appeals upheld the Attorney General's standing to sue the participants in a group pattern or practice of prohibited activities without the necessity of alleging concert or conspiracy among the group members. Previous authority established that the words pattern or practice[51] were to be used in their generic sense, not as words of art,[52] and that the number of violations would not be determinative.[53] The legislative history of the term indicates that it was intended to connote activity of a repeated, routine, or generalized nature and not merely isolated or sporadic incidents.[54] However,

---

[48]*Id.* at 1241.

[49]304 F. Supp. 1305 (D. Md. 1969).

[50]*Id.* at 1312.

[51]Simliar terminology is used in other civil rights legislation to authorize action by the Attorney General. *See* 42 U.S.C. § 2000a-5 (1970) (public accommodations); *id.* § 2000e-6 (equal employment).

[52]United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969). "The words pattern or practice were not intended to be words of art. No magic phrase need be said . . . ." *Id.* at 1314.

[53]United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971) "[N]o mathematical formula is workable, nor was any intended. Each case must turn on its own facts." *Id.* at 227.

[54]The Civil Rights Act of 1968 was passed immediately following the assassination of Dr. Martin Luther King. The fair housing provisions, originally S. 1358, were added by the Senate to H.R. 2517, a house passed antiriot bill. The legislative history reveals no discussion of the pattern or practice terminology. *See* 1967 *Hearings*. *See also* Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969). However the legislative history of a similar provision in 42 U.S.C. § 2000e-6 (1970), dealing with employment discrimination is enlightening. Concerning the Attorney General's standing, Senator Humphrey stated:

in *Lawrence* the court was required to define group pattern or practice as a question of first impression. All previous authority dealt with an allegation of a pattern or practice by a single labor union,[55] employer,[56] motel,[57] apartment,[58] or realty company.[59]

Although not specifically mentioned by the court of appeals the legislative history of similar provisions indicates a desire to limit the Attorney General's participation only with regard to the magnitude or frequency of the prohibited acts and not with regard to the character of the acts.[60] It was clearly intended that the litigation of isolated discriminatory acts be left to private parties under sections 3610 or 3612.[61] On the other hand, the Attorney General's participation was contemplated when the prohibited acts were more frequent and widespread.

In determining the magnitude of the allegedly illegal activities, the court was confronted with two alternative approaches. The

---

> [A] pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.
>
> . . .
>
> . . . The issue would then be whether, as a matter of fact, there was a refusal of service or employment amounting to a pattern or practice, not whether the companies acted in concert or in a conspiracy. And the bill would authorize the Attorney General to join all or some of the several defendants in the same action.

110 CONG. REC. 14270 (1964).

[55]United States v. Ironworkers, Local 1, 438 F.2d 679, 680 (7th Cir. 1971) (pattern or practice under 42 U.S.C. § 2000e-6(a) (1970)).

[56]United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971) (pattern or practice under 42 U.S.C. § 2000e-6(a) (1970)).

[57]United States v. Gray, 315 F. Supp. 13, 22 (D.R.I. 1970) (pattern or practice in public accommodation under 42 U.S.C. § 2000a-5 (1970)).

[58]United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) (pattern or practice in apartment rental under 42 U.S.C. § 3613 (1970)).

[59]United States v. Mintzes, 304 F. Supp. 1305, 1314 (D. Md. 1969) (pattern or practice in the sale of real estate under 42 U.S.C. § 3613 (1970)).

[60]*See* note 54 *supra* & accompanying text.

[61]42 U.S.C. §§ 3610, 3612 (1970) authorize litigation by a private party to enjoin the occurrence of a single prohibited act.

activity could be viewed from the perspective of the homeowner as argued by the Attorney General or from the perspective of the realtor as argued by the defendants. If the perspective of the realtor was adopted, a showing of coordinated effort would be required to establish a group pattern or practice. After some initial reluctance at the trial court level, the homeowner's perspective was adopted.[62]

The court of appeals held that the homeowner's perspective must be adopted in an attempt to eliminate the blockbusting syndrome. The court reasoned that the sociological phenomenon of a transitional neighborhood is enough to attract numerous real estate agents intent on reaping the available profits.[63] Because a transitional neighborhood is already ripe with racial tension the constant solicitation by real estate agents has the same effect on the individual homeowner as more explicit racial representations.[64] Furthermore, the very essence of blockbusting is the fierce competition between individual realtors for the available homes in the area. To require a showing of concert or conspiracy in this context would

---

[62]The district court dealing with preliminary motions initially rejected the homeowner's perspective and stated:

> We conclude that 'pattern or practice' must be approached from the point of view of the persons allegedly violating the Act. . . . If the meaning of a group pattern or practice is to be approached from the defendant's point of view it is not sufficient merely to allege a coincidence of similar section 3604(e) representations by several realty companies in a particular geographical area. While this might be a pattern or practice from the homeowner's point of view, it is not a pattern or practice when viewed from the defendant's standpoint. The pattern or practice must be one on the part of the group acting as a unit. This would require at the very least, a showing of some coordination of effort on the part of the defendants. Any less standard would provide the Attorney General with enforcement powers over the isolated acts of individual defendants acting independently of each other, merely because these persons' acts coincide in time and place with the acts of other violators.

327 F. Supp. at 493.

However, after the trial, the court adopted the homeowner's perspective. The district court held "that by a group pattern or practice the neighborhoods involved were, because of the racial transition thereof, harassed beyond endurance and that each of the defendants in some measure participated therein." 335 F. Supp. at 1007.

The court of appeals explicitly adopted the homeowner's perspective and rejected any requirement of conspiracy or concerted action. 474 F.2d at 124.

[63]474 F.2d at 124.

[64]*See* note 46 *supra*.

be totally unrealistic.[65] The purpose of section 3604(e) is to stop the economic and social damage caused by the panic sale of homes in transitional neighborhoods, regardless of whether such sales are caused by excessive solicitation conducted by numerous independent agents or the result of a coordinated scheme.

The Supreme Court has stated that civil rights statutes are to be accorded broad construction in accordance with their purpose.[66] Only a liberal construction of section 3613 will give substance to the antiblockbusting provision of the Act.[67] To date all but one of the actions filed under section 3604(e) have been brought by the Justice Department.[68] It would be unrealistic to expect that effective enforcement can be achieved through private litigation in view of the widespread public ignorance of the statutory provisions[69] and the expense of private litigation.[70]

---

[65]Rejecting the requirement of a concert or conspiracy, the court of appeals stated:

> Blockbusting by its very nature does not require concerted action or a conspiracy to wreak its pernicious damage. There is, for example, no need for XYZ Realty to conspire with ABC Homes to set off a pattern or practice of activities violating the act. The sociological phenomenon of a transitional area is enough to attract blockbusters intent on culling all the profits that can be derived from the area. The very essence of the phenomenon is that a large number of competitors individually besiege an area seeking to gain a share of the market.

474 F.2d at 124.

The solicitation activity of individual agents may not be harmful per se, but becomes so when undertaken simultaneously by a great many agents in a transitional neighborhood. *See generally* Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J.L. & SOC. PROB. 538 (1971).

[66]Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). "A narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded . . . ." *Id.* at 237.

[67]Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). With regard to 42 U.S.C. § 3610(a) (1970) which provides for private litigation, the Court stated, "We can give vitality to [§ 3610(a)] only by a generous construction . . . ." 409 U.S. at 212.

[68]Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969). In a private suit based on 42 U.S.C. § 3612, the plaintiff alleged that the defendant realtor made representations prohibited by section 3604(e) and the court granted injunctive relief. 304 F. Supp. at 1241.

[69]Glassberg, *Legal Control of Blockbusting*, 1972 URBAN L. ANN. 145, 156.

[70]Although section 3612(b) provides that a court may at its discretion "appoint an attorney for the plaintiff and may authorize the commencement of

The court of appeals also rejected the defendants' allegation that in order for the Attorney General to have standing based on a group pattern or practice, each member of the group must be engaged in an individual pattern or practice.[71] The court held that to so construe the statute would be to make the phrase "group of persons" totally superfluous and ignore its clear statutory purpose. The court reasoned that the statute provides an either/or situation and if either a person or group is involved in a pattern or practice, the Attorney General has standing to sue.[72]

Having upheld the constitutionality of section 3604(e) and the Attorney General's standing, the court of appeals then reviewed the propriety of the trial court injunction. Pursuant to its finding of illegal activity the trial court enjoined the defendants from any attempt to induce the sale of homes by statements prohibited by section 3604(e). Furthermore, the defendants were ordered to conduct any future solicitation in a uniform manner and were prohibited from conducting concentrated solicitation in transitional neighborhoods.[73]

The court of appeals rejected the appellant's contention that the injunctive relief was inappropriate.[74] The court reasoned that an injunction is appropriate so long as there remains the possibility

---

a civil action upon proper showing without the payment of fees, costs, or security," the legislative history of the provision indicates that only indigent plaintiffs were considered financially eligible. 114 CONG. REC. 5514 (1968) (remarks of Senator Mondale). Although section 3612(c) authorizes the award of court costs and reasonable attorneys' fees to a prevailing plaintiff, the average homeowner is not in a position to take such a gamble. For a comparison of the alternate means of private enforcement, see Note, *Blockbusting*, 59 GEO. L.J. 170, 179 (1970).

[71] Appellant's Brief at 17.

[72] The court also held the Attorney General had standing to sue under the Government's third claim and reversed the trial court's holding that the Attorney General must provide evidence to support his allegation that an issue of general public importance is raised. 474 F.2d at 125 n.14. The Government's third claim was based on the so-called "second alternative" of section 3613. *See* note 10 *supra* & accompanying text.

[73] *See* note 5 *supra*.

[74] Appellant's Brief. In part the appellant requested:

[1.] A finding that injunctive relief is inappropriate to Bob Lawrence,
[2.] A finding that Bob Lawrence committed no prohibited act,
[3.] A finding that Bob Lawrence has not engaged in any "pattern or practice" designed to deny to a person his civil rights.

Id. at 26.

of future wrongs.[75] In determining the likelihood of future violations, the court felt it appropriate to consider expressed intent to comply with the law, the effectiveness of any discontinuance of the illegal acts, and the character of past violations.[76] The court of appeals held that the defendant's refusal to admit that his agents had engaged in prohibited activity, in spite of the trial court's finding to the contrary, precluded a finding that repetition of the prohibited activities was unlikely. The court of appeals also noted that the decree was tailored to minimize interference with the defendant's business activities and sought merely full compliance with the law.[77] In this context the court found that the decree was an appropriate exercise of the trial court's discretion.[78]

The *Lawrence* decision is significant in that it represents the first circuit court interpretation of section 3604(e). In affirming the constitutionality of section 3604(e) and sustaining the Attorney General's standing to seek injunctive relief under section 3613, the *Lawrence* decision has given vitality to the Fair Housing Act and will enable effective future litigation to eliminate the plague of blockbusting.

---

[75]The court of appeals cited Swift & Co. v. United States, 276 U.S. 311 (1928), which held that "an injunction deals primarily, not with past violations, but with threatened future ones . . . an injunction may issue to prevent future wrongs, although no right has yet been violated." *Id.* at 326.

[76]474 F.2d at 126. *See* United States v. W.T. Grant Co., 345 U.S. 629 (1953). In denying the requested injunction, the Court stated, "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" *Id.* at 633.

[77]It should be noted that the trial court "was not overly impressed with the gravity of the individual transgressions of the defendants" but felt the potential injury to the homeowners from any repetition of past acts justified the injunctive relief. 335 F. Supp. at 1007.

[78]The court of appeals rejected the appellant's request for attorney's fees as utterly frivolous. 474 F.2d at 127.